Supreme Court, U. S.
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In The

Supreme Court of the United States

October Term, 1977

No. **77-650**

LOUISE SPENCER,

Petitioner,

vs.

FLOYD SKELTON, IDAHO LIVESTOCK COMMISSION COMPANY, AND THE IDAHO FIRST NATIONAL BANK,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF IDAHO

LLOYD J. WEBB
of
WEBB, BURTON, CARLSON & PEDERSEN
P. O. Box 33
Twin Falls, Idaho 83301
Attorneys for Petitioner

Orval Hansen
Attorney At Law
1775 Pennsylvania Ave. N.W.
Suite 700
Washington, D.C. 20006

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF IDAHO

Petitioner respectfully prays that a Writ of Certiorari issue to review the Judgment and Opinion of the Supreme Court of the State of Idaho entered in this proceeding as a final judgment on July 20, 1977.

OPINION BELOW

The June 27, 1977, Opinion of the Supreme Court of the State of Idaho, made final July 20, 1977, appears in separate appendix hereto at pages App. 1 to App. 10. This Opinion affirmed the Judgment of the District Court of the Seventh Judicial District of the State of Idaho, in and for Bonneville County, Idaho, dated January 21, 1976.

—o—

JURISDICTION

The Final Judgment of the Supreme Court of the State of Idaho was entered July 20, 1977, and this Petition for Certiorari was filed within ninety (90) days of that date. This Court's jurisdiction is invoked under 28 USC § 1257(3).

—o—

QUESTIONS PRESENTED

1. Have the Petitioner's rights to due process under the 14th Amendment been violated by the handling of the trial in this matter?

2. Have the Petitioner's rights to due process as provided by the 14th Amendment been violated by her deprivation of property without due process under color of Idaho law?

3. Have the Petitioner's 14th Amendment rights to equal protection of the law been violated through the acts of the Idaho Court in the application of Idaho law?

4. Have the Petitioner's right to jury trial been violated by the refusal of the Trial Court in this matter to grant jury trial?

5. Have the Petitioner's right to counsel as guaranteed by the 6th and 14th Amendments to the United States Constitution been violated by the process employed by the Idaho Courts in this litigation?

6. Have contract rights of the Petitioner been abrogated by the acts of the Idaho Courts in this matter?

—o—

CONSTITUTIONAL PROVISIONS

The following constitutional provisions are involved in the resolution of this matter:

(1) Article 1, § 10 of the United States Constitution; (2) the 6th Amendment to the United States Constitution; (3) the 7th Amendment to the United States Constitution; (4) the 14th Amendment to the United States Constitution.

—o—

STATEMENT OF THE CASE

I. The Background.

In 1960, Stanley R. Spencer, the husband of the Petitioner, died testate in the State of Idaho. At the time of his death, Spencer was a principal in a very successful livestock commission business. He was a partner in the

"Auction Company," the actual operating entity of the livestock auction business, a shareholder in the "Commission Company," the company which held the real property and physical features used in the operation of the auction company, and a partner in the "Trading Company," a separate entity which purchased cattle for gain and resale.

According to Idaho law, the estate was the community property of Stanley R. Spencer and the Petitioner, unless through inter vivos gifts, the decedent's half of the community estate had been dissipated. In any event, at least half of the estate remaining at the date of death of Stanley R. Spencer was the property of the Petitioner.

According to the will of Stanley R. Spencer, the Respondent, Idaho First National Bank, was named executor and trustee, and the bulk of the estate, according to the will, became part of the corpus of a trust for the benefit of the decedent's children.

Upon the death of Stanley R. Spencer, the Respondent, Idaho First National Bank, took possession of the entire estate including the Petitioner's interest in the community estate. This was done under color of Idaho law.

On March 31, 1961, in the course of the probate, the Respondent, Idaho First National Bank, acting through the same counsel which represented the decedent, the executor and the buyer, purportedly "sold" to the Respondent Skelton, the interest of the decedent and of the Petitioner in the "Auction Company". The sale was in fact a gift because the "consideration" given was money due the decedent. This "sale" was accomplished without the

consent of the Petitioner purportedly under color of court process of the Idaho courts and purportedly under color of Idaho law. This "sale", first discovered by the Petitioner some eleven days after the "sale", was attacked by the Petitioner on the basis of a lack of authority to deal with her interest in the property and upon the basis of fraud. After unsuccessful attempts to set aside the sale in the Probate and District Courts of Bonneville County, Idaho, the Petitioner appealed the question to the Idaho Supreme Court and in *Spencer v. Spencer,* 91 Idaho 880, 434 P. 2d 98 (1967) the Idaho Supreme Court reversed the lower court orders which had refused to consider the Petitioner's request for relief, and remanded, with instructions to proceed to trial on the questions posed by the Petitioner's complaint.

Against this background, this matter was set for trial in the District Court for Bonneville County, Idaho, on May 1, 1973.

II. The Primary Case Disposition.

After a number of procedural events, the Complaint of the Petitioner attacking the 1961 sale of her interest and of the estate's interest in the "Auction Company" came to issue and was set for jury trial on May 1, 1973. As of the first day of trial, materials critical to the trial had not been made available to the Petitioner despite the remand order of the Idaho Supreme Court ruling that these materials were to be made available. These significant materials included the decedent's books which had been kept under the exclusive control of the Respondent, Idaho First National Bank, without direct access thereto by the Petitioner, despite her apparent right to access to

those books, again purportedly under color of Idaho law, through the claim of the Respondent, Idaho First National Bank, that it had exclusive possessory and managerial rights as to all affairs of the community estate regardless of the interest of the Petitioner. Also included were the books of the "Auction Company" which had been held in the possession of the Respondent Skelton, purportedly acting under color of Idaho law, as surviving partner of the "Auction Company" partnership. While some limited access had been permitted to the decedent's books for the benefit of the Petitioner's accountants (without any personal access thereto by the Petitioner) no access had been permitted to the books of the "Auction Company," although access to these books was, of course, critical to the development of the issues in the pending case.

The presiding District Judge did require the books to be brought into court on the first day of trial, May 1, 1973. This was the first time that the Petitioner, her counsel, or accountants had been given access to these books, a highly critical part of the evidence necessary to the trial. At the time that the books were made available the trial had actually commenced and the jury was in the process of empanelment.

On May 2, 1973, the Petitioner was contacted by her then counsel and advised that settlement negotiations would be held, directed toward the settlement of the litigation specified. At that time the Petitioner was impecunious in that the Respondent, Idaho First National Bank, after twelve years, retained control over the community estate, purportedly under color of Idaho law,

doling out to the Petitioner only a very modest family allowance which was insufficient even for her basic needs, without any funds for the payment of attorneys' fees or other extraordinary costs.

At this posture of the case, the Petitioner was still without real access to the highly critical books both of the decedent and of the "Auction Company." She was without help from the entity which controlled her funds and records, purportedly under color of Idaho law, the Idaho First National Bank, which was in truth in an antagonistic position toward her in the litigation, having acquiesced in the "sale" which she claimed to be vitiated by fraud and by lack of consideration. She was under the misimpression, given her by counsel, that she could not disagree with her counsel's disposition of the case and the negotiations directed toward the settlement of the case, without discharging him. She was under the misimpression, given by counsel, that she could not discharge counsel without payment of his accrued fees, funds for the payment of which fees she lacked because of the control of her estate by the Respondent, Idaho First National Bank. She was under the misunderstanding that the case would be lost (the Trial Judge was holding the jury pending negotiations) if the negotiations failed through her refusal to participate therein and that the case would be dismissed on a default basis. She lacked knowledge of the law.

Against this background, a "settlement" was purportedly achieved. There were in fact no offers and no negotiations. The Petitioner was confronted with a proposed settlement agreement and was told that this was

what she must accept. The "settlement agreement" demanded that in addition to surrendering her claim in connection with the 1961 "sale" she would be required to transfer her interest in the stock of the "Commission Company" and her interest in the "Trading Company" to the Respondent Skelton. Moreover, she was required, in violation of contracts dated 1963 and 1968, to obtain the signature of the children of her and of the decedent before the fruits of the "settlement" would be made available to her. The requirement of the children's signature was made under color of Idaho law to the effect that a widow is without right to the disposition of her interest in the community estate and that right is retained by the executor and by the children of the husband. Even though the thrust of the original Complaint by the Petitioner was that the "sale" was achieved without her consent, even though the property was hers or at least half hers, in the "settlement" this same basic premise was subscribed to and, under color of Idaho law, it was required that Petitioner retain that subservient role assigned to a widow under Idaho law requiring that the children of the parties be signatories to the disposition of the Petitioner's own property.

Absent actual access to the facts, absent legal knowledge, absent assistance, financial or otherwise, from the party given control over her property by Idaho law, and absent independent counsel, the Petitioner executed the "settlement" agreement, an agreement grossly disproportionate to the actual value of the claims and assets foregone and assigned by the terms of the "settlement" to the benefit of the Respondent Skelton. Upon obtaining independent counsel and some knowledge of the law, the Petitioner repudiated the "settlement agreement".

III. The Present Case.

Upon the refusal of the Petitioner to implement the "settlement agreement" of May 1973, this action was initiated by the Respondent Skelton, to compel the Petitioner to implement the "settlement agreement". For some significant period of time, the Petitioner was without counsel and had no opportunity to defend the action. She was still deprived of access to her estate by the Respondent, Idaho First National Bank, purportedly acting under color of Idaho law, which refused to distribute the estate and to give to the Petitioner her interest therein. The Petitioner was then in bad health and was unable to personally come from her home in the State of Colorado to the State of Idaho to defend the action. Appearances were made by the Petitioner without benefit of counsel in the pending action, but she was repeatedly advised that counsel was necessary and that she should obtain counsel, whomever she was able to obtain, and that she should accept a subservient role to that counsel in the litigation. Although it was apparent from the unskilled pleadings of the Petitioner that jury trial of the claims of the Respondent was demanded, the Trial Judge, purportedly acting under color of Idaho law, refused to give jury trial. He further refused to assist the Petitioner in obtaining the assistance of counsel.

Ultimately the Petitioner was able to obtain the assistance of counsel even though she remained impecunious and without funds for attorneys' fees, but that counsel, without real opportunity to develop the facts of a very complex case, was required to immediately appear and be ready for trial. Adding to the complexity of the

problem, the Probate Court files of the estate of the decedent, files of the County of Bonneville, State of Idaho, were then missing and not subject to access by counsel for the Petitioner.

Against this background, the case went to trial in the absence of a jury and in the absence of the Petitioner, who was unable, because of her financial circumstances and because of her health, to be present at the trial. She was permitted to present testimony by affidavit, but this was a poor substitute for actual appearance and deprived the Petitioner of her right to confront the witnesses and generally deprived her of due process in the course of the trial.

In trial, former counsel for the Petitioner was permitted to testify as to conversations of a confidential nature held between counsel and the Petitioner and was further permitted to give his opinion as to the "fairness" of the "settlement agreement".

The Trial Court accepted the appraisal given by former counsel, over strong objection of present counsel for the Petitioner, as to the "settlement", based upon the revelation of confidential discussions between former counsel and the Petitioner and evaluation by former counsel, without supporting data, of the "fairness" of the "settlement agreement". Favorable decision was given the Respondent Skelton and the Petitioner was required to implement the "settlement agreement", or, in the absence of this, to have the Clerk of the District Court act in her stead in the implementation thereof.

The Petitioner took this matter to the Idaho Supreme Court, upon an appeal, where the decision was affirmed,

the Idaho Supreme Court rejecting arguments of impropriety of testimony of former counsel, impropriety of compulsion in the implementation of the "settlement agreement," fraud and lack of the essential elements of contract in the "settlement agreement" and other arguments here set out.

This Petition is taken from the final judgment of the Idaho Supreme Court affirming the District Court's disposition of the action filed by the Respondent Skelton.

REASON FOR GRANTING THE WRIT

The Petitioner believes that questions of fundamental constitutional dimension are presented by this case. The Petitioner has been denied the due process of law afforded her by the 14th Amendment both in the handling of the case by the courts of the State of Idaho and by her deprivation of property without due process of law through the retention by the Respondent, Idaho First National Bank, of her property in the community estate of herself and the decedent and, through that property, the ability to properly represent herself in the course of the legal proceedings in the State of Idaho. The Petitioner has also been deprived of the equal protection of the law as afforded her by the 14th Amendment through the application of the Idaho law of probate and management of community estates. She has been denied 7th Amendment rights to jury trial; she has been denied 6th and 14th Amendment rights to the assistance of counsel; and she has seen her contract rights abrogated and violated in

violation of Article II, § 10 of the United States Constitution.

Because of these violations and because of the continuing violation of the rights of women through the Idaho Probate Code, the Petitioner believes there is a substantial federal question to be determined by the acceptance of this Petition.

I.

A Denial of Due Process

A. The handling of the litigation by the Idaho Courts.

While the United States Constitution does not prescribe any given set of procedures which must be employed by the state in the processing of litigation, federal constitutional standards, as demanded by the 14th Amendment, do require some type of fair and orderly procedure. *Jenkins v. McKeithen,* 395 U. S. 411, 428-430, 89 S. Ct. 1843, 1852-1853 (1969). Among those standards of due process in the handling of litigation are the right to notice, the right to appear personally, the right to confront witnesses, the right to effective assistance of counsel, and the right to fair judgment. As this Court has stated in *Jenkins* (at p. 428 U. S., p. 1852 S. Ct.) the right to confront witnesses is essential to due process. In this case, as we have pointed out in the Statement of the Case, the Petitioner was effectively denied assistance of counsel during several phases of the trial, she was not given the opportunity to appear personally, she was not given any real opportunity to confront witnesses against her and her counsel was obliged to attempt to defend the

case without adequate time, without adequate access to records, and without adequate assistance of his client.

The present case was in actuality only an extension of the earlier case intended to be dispositive of the Petitioner's claim to set aside a "sale" of her interest in property and of the interest of her deceased husband in that same property. In that earlier trial, the Petitioner had been denied effective preparation and effective assistance of counsel by the Trial Court's refusal to allow her access to certain highly critical materials until the beginning day of trial.

Both cases involve serious breaches of the Petitioner's right to some fair and orderly procedure in the Idaho Courts, designed to fairly determine the mutual claims of the parties.

B. The deprivation of property without due process.

Under the 14th Amendment, no person can be deprived of property without due process. Recent decisions of this Court have, if anything, made that fundamental Constitutional right more strongly established than at any other time in history. *Fuentes v. Shevin,* 407 U. S. 67, 86, 92 S. Ct. 1983, 1996 (1972); *Board of Regents of State's Colleges v. Roth,* 408 U. S. 564, 573 and 577, 92 S. Ct. 2701, 2706-2708 (1972); *North Georgia Finishing, Inc. v. Di-Them, Inc.,* 419 U. S. 601, 95 S. Ct. 719 (1975). According to this Court's reasoning in *Fuentes* (at p. 87 U. S., p. 1997 S. Ct.) any significant property interest is protected by the 14th Amendment.

Under Idaho law (prior to its amendment in 1974—ISL 1974, ch. 194, § 2, p. 1502) the husband was given

exclusive management and control of the community property, with certain minor exceptions. 32-912, I. C. the Idaho Code, 15-410, gave the executor the right to possession of all real and personal estate of the decedent. Interpreting this section and 14-113, I. C., the Idaho Supreme Court has granted the administrator the right to manage and control not only the decedent's half of the estate, but the survivor's half as well. *Swinehart v. Turner,* 44 Idaho 461, 467, 259 p. 3 (1927); *Davenport v. Simons,* 68 Idaho 21, 24, 189 P. 2d 90 (1948). The net effect of this Idaho legislation and court decision has been to deprive the Petitioner herein of her property, without process of law, for seventeen years. During all that period of time, the Respondent, Idaho First National Bank, has, under color of Idaho law as here set out, deprived the Petitioner of her right to management and control over her own property to her very serious disadvantage. Because she has not had that property, she has been unable to fund her representation in the various challenges that have been posed to the integrity of her property. Moreover, through court process, her property has been sold without her consent, she has been obliged to add disinterested parties to the fruition of any purported "settlements" and has generally been seriously deprived of her 14th Amendment rights. No modification in the Idaho case law as to the administration of estates seems to have made any change in the case law cited. The net effect of the statutes and their interpretation by the Idaho Courts is to deprive a widow of the right to her property by reason of the dictates of her deceased husband as to his desired control of the community property.

II.

Equal Protection of Law

The Idaho Probate Law has been the subject of severe criticism in its cavalier treatment of women. This Court in *Reed v. Reed,* 404 U. S. 71, 92 S. Ct. 251 (1971) struck down the provision of Idaho law which discriminated in the administration of estates as between males and females. This is the language of the Court at p. 75 (U. S.), p. 253 (S. Ct.):

> ". . . We have concluded that the arbitrary preference established in favor of males by § 15-314 of the Idaho Code cannot stand in the face of the Fourteenth Amendment's command that no State deny the equal protection of laws to any person within its jurisdiction."

Clearly here a surviving spouse is denied the equal protection of the law and has, through seventeen long years, been deprived of access to her property and, by access to that property, access to effective representation in the courts. Surely it cannot be suggested that the "settlement," demanding as it does a signature of her children to a purported contract dealing with her property, all under the color of Idaho law, can be anything but the rankest denial of equal protection.

III.

The Right of Jury Trial

Whether or not one interprets the 7th Amendment's guarantee of jury trial to apply only to the Federal Courts or to the State Courts as well, surely the right to jury trial is a fundamental concept of due process

where that right to jury trial was part of the common law fabric. *Baltimore & Carolina Line v. Redman,* 295 U. S. 654, 656-657, 55 S. Ct. 890, 891 (1935). As this Court has stated the federal policy in favor of the preservation of jury trial for citizens litigant is strong. *Simler v. Conner,* 272 U. S. 221, 222, 83 S. Ct. 609, 610 (1963).

Here the Petitioner was denied her right to jury trial. Certainly her inartful attempts at pleading which may not have concisely made the jury demand, still were sufficiently clear that she was requesting a jury trial and the Trial Court refused that right to jury trial.

IV.

Right to Counsel

As has been pointed out in the Statement of the Case, the Petitioner has in many significant respects been denied the right to counsel, particularly in the final action tried before the Idaho Courts. The right to counsel has been recognized as a fundamental part of the concept of due process as protected by the 14th Amendment, whether the proceeding in question is criminal or civil in nature. *Powell v. Alabama,* 287 U. S. 45, 53 S. Ct. 55 (1932); *Chandler v. Freitag,* 348 U. S. 3, 10, 75 S. Ct. 1, 5 (1954); *Reynolds v. Cochran,* 365 U. S. 525, 530, 81 S. Ct. 723, 726 (1961); *Holt v. Virginia,* 381 U. S. 133, 136, 85 S. Ct. 1374, 1378 (1965). This is the language of this Court in *Chandler, supra*:

> "(The Court here quotes from *Powell v. Alabama,* supra) if in any case, civil or criminal, a State or Federal Court were arbitrarily to refuse to hear a party by counsel, employed by and appearing for him, it reasonably may not be doubted that such a refusal would be a denial of hearing, and therefore, of due process in the constitutional sense."

In addition to the denial of effective assistance of counsel as specified, another kind of denial of counsel was present in this case. Certainly a part of effective assistance of counsel is the belief that one may freely impart confidences to counsel, sure of the rule which prohibits the disclosure of those confidences. Moreover, counsel, privy to the innermost thoughts of his client, certainly ought not to be able subsequently to testify as to the product of those thoughts in the purported reasonableness of a "settlement". In this case, counsel was permitted to do both, to reveal confidences and to testify as to the purported reasonableness of a "settlement". The Trial Court's consent to this heinous practice effectively deprived the Petitioner of her right to effect counsel in the "settlement" and seems to the Petitioner to be clearly another deprivation of the right to effective counsel and the right to due process.

V.

Abrogation of Contract

In the process of the "settlement" here described, the Petitioner was required to abrogate contracts of 1963 and 1968 by the terms of which her children agreed to forego any claim to any part of their father's estate in favor of the Petitioner. By the "settlement", now enforced by the Idaho Courts, she is compelled, in order to achieve any fruits of that "settlement", to obtain the joinder of her children. Clearly this is an abrogation of contract in violation of the provisions of the United States Constitution.

———o———

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the Judgments and Opinions of the Supreme Court of the State of Idaho.

Respectfully submitted,

WEBB, BURTON, CARLSON & PEDERSEN
By LLOYD J. WEBB

P. O. Box 33
Twin Falls, Idaho 83301

Attorneys for Petitioner

APPENDIX

In The Supreme Court of the State of Idaho

No. 12250

Pocatello March 1977 Term

Filed: June 27, 1977

R. H. Young, Clerk

FLOYD E. SKELTON and IDAHO LIVESTOCK COMMISSION COMPANY, an Idaho Corporation,

Plaintiffs and Respondents,

vs.

LOUISE SPENCER, LELAND SPENCER, CARMEN SPENCER JENSEN, ALEXA SPENCER ELKINGTON, JANET SPENCER, MIRIAM SPENCER, and THE IDAHO FIRST NATIONAL BANK, Executor of the Estate of S. R. Spencer, Deceased,

Defendants,

LOUISE SPENCER and MIRIAM SPENCER,

Defendants and Appellants.

Appeal from the District Court of the Seventh Judicial District of the State of Idaho, Bonneville County. The Honorable Willard C. Burton, District Judge.

Appeal from a judgment of the district court granting to plaintiffs specific performance of settlement agreements executed by plaintiffs and defendants. *Affirmed.*

Lloyd J. Webb, Webb, Burton, Carlson & Pedersen, Twin Falls, for appellants.

Terry L. Crapo, Holden, Holden, Kidwell, Hahn & Crapo, Idaho Falls, for respondents.

SCOGGIN, D. J. (ret.)

Defendants and appellants Louise Spencer and her daughter Miriam Spencer appeal from a judgment of the district court in favor of plaintiffs and respondents Floyd E. Skelton and the Idaho Livestock Commission Company on their action for specific performance. Respondents brought their action seeking specific performance of settlement agreements which they and the appellants executed to settle an action pending between them. We affirm the judgment granting specific performance.

The basic facts of the action which was allegedly settled by the agreements at issue here are stated in the opinion of this Court in *Spencer v. Spencer,* 91 Idaho 880, 434 P. 2d 98 (1967). Following the remand to the district court after the appeal to this Court, several years of postponements and delay ensued before the underlying action was set for trial. However, the action was finally set for trial on May 1, 1973, and on that day a jury was selected. Before counsel made their opening statements, respondents and appellant Louise Spencer entered into negotiations through their respective counsel to settle the action. A compromise was reached which was reduced to the written settlement agreements at issue here.

At the time the settlement agreements were executed and for some two months thereafter, appellant Louise Spencer was apparently satisfied with the agreements and with the work of her then counsel in obtaining them. Subsequently Mrs. Spencer discharged her former attorneys and refused to perform her covenants under the settlement agreements. Respondents served notice of default and brought this action for specific performance of the settlement agreements.

The minute details of the settlement agreements are not important here. Briefly, in consideration of a payment of $37,500 from respondent Skelton ($5,000 of which was paid upon execution of the agreements), appellants covenanted not to proceed further in the action brought by Mrs. Spencer and not to execute against respondent Skelton. A covenant not to sue was executed with respondent Idaho Livestock Commission Company in consideration of a payment of $150,000 ($25,000 paid upon execution) and upon the covenant of appellants to obtain good title to and convey to the Company the stock of Mrs. Spencer's deceased husband in the Company.

The focus of appellant Louise Spencer's position in this case is an attack on the enforceability of the settlement agreements. Her evidence, which consisted solely of her affidavit, was largely directed to the pressures allegedly exerted on her during the settlement negotiations. The principal source of these alleged pressures, giving her affidavit a fair reading, was purportedly her then attorneys. There are also allegations against respondent Skelton of essentially the same character as those advanced in the original action: fraud and breach of the fiduciary duty of a surviving partner. The formal lines of appellants' defense to the action for specific performance were based on the grounds of fraud, duress, coercion and lack of assent in the execution of the settlement agreements.

The case was presented to the trial court at two separate hearings. Respondents' case-in-chief was put on at the first hearing, which appellant Louise Spencer was unable to attend personally. The case was continued for a while to determine whether Mrs. Spencer would present

her testimony in person, or by deposition or affidavit. At the second hearing, Mrs. Spencer's affidavit was read into the record as her testimony and then appellants rested. Respondents presented a rebuttal case through the testimony of Mrs. Spencer's former attorneys.

In granting respondents the relief of specific performance of the settlement agreements, the trial court expressly found and concluded that appellants had assented to the execution of the settlement agreements, and that neither respondents nor appellant Louise Spencer's former attorneys had been responsible for any fraud, duress or coercion in the negotiations leading to, and the execution of, the settlement agreements. In reaching its decision, the trial court relied upon the testimony of appellant Louise Spencer's former attorneys, which was admitted over the appellants' objections that it violated the attorney-client privilege for confidential communications.

Although appellants make twenty-nine assignments of error, the repeated ground for their assignments of error is the trial court's alleged error in admitting the testimony of appellant Louise Spence's former attorneys. Analytically, the case before us thus presents two issues: (1) Did the trial court err in admitting into evidence the testimony of appellant Louise Spencer's former attorneys on the ground that she waived the privilege against disclosure of confidential communications between attorney and client by testifying to the confidential communications? (2) Is there substantial, competent evidence in the record to support the trial court's findings of fact, conclusions of law and judgment?

The client's privilege against disclosure of confidential communications between attorney and client is provided for in Idaho by statute. I. C. § 9-203 provides in pertinent part:

> "9-203. Confidential relations and communications. —There are particular relations in which it is the policy of the law to encourage confidence and to preserve it inviolate; therefore, a person can not be examined as a witness in the following cases:
>
> . . . .
>
> 2. An attorney can not, without consent of his client, be examined as to any communication made by the client to him, or his advice given thereon in the course of professional employment."

In construing a related subsection of I. C. § 9-203, we have previously noted that:

> "[I]t must be said that so far as interpreting subdivision 2 of C. S., sec. 7937, [I. C. § 9-203 (2)] the use of the words 'without the consent' of the client made no change in the common law, and that that subdivision is a mere restatement of the common law. It is reasonable to say that the legislature intended the common-law interpretation thereof." *Sprouse v. Magee,* 46 Idaho 622, 631, 269 P. 993 (1928).

Thus, as at common law, the "consent" of client to the disclosure of confidential communications may be either express or implied from the conduct of the client. *Grant v. Harris,* 116 Va. 642, 82 S. E. 718, 719 (1914); 8 Wigmore on Evidence § 2327, at 634 (McNaughton rev. 1961). When the "consent" of the client is found, the privilege is said to have been "waived."

The waiver, if any, must be found by implication. Therefore we are faced with a slightly more difficult problem. Wigmore has succinctly stated it as follows:

"What constitutes a *waiver by implication?*

"Judicial decision gives no clear answer to this question. In deciding it, regard must be had to the double elements that are predicated in every waiver, i. e., not only the element of implied intention, but also the element of fairness and consistency. A privileged person would seldom be found to waive, if his intention not to abandon could alone control the situation. There is always also the objective consideration that when his conduct touches a certain point of disclosure, fairness requires that his privilege shall cease whether he intended that result or not. He cannot be allowed, after disclosing as much as he pleases, to withhold the remainder. He may elect to withhold or to disclose, but after a certain point his election must remain final." 8 Wigmore, *supra,* § 2327 at 635-36. (Emphasis in original; footnote omitted.)

Significant consideration must also be given to whether the rationale behind the privilege—encouraging a full and frank professional relationship between attorney and client—has any continued vitality in light of the client's conduct. *See:* Comment, "Limitations on California Professional Privileges: Waiver Principles and the Policies They Promote," 9 U. C. D. L. Rev. 477 (1976).

Among others, Wigmore has identified the following as two instances in which a waiver by implication will be found:

"(4) The client's offer of his own or the attorney's testimony as to a *specific communication* to the attorney is a waiver as to all other communications to the attorney on the same matter. This is so because the privilege of secret consultation is intended only as an incidental means of defense, and not as an independent means of attack, and to use it in the latter character is to abandon it in the former.

. . . .

"(6) When the client alleges a breach of duty to him by the attorney, the privilege is waived as to all communications relevant to that issue." 8 Wigmore, *supra,* § 2327 at 638. (Emphasis in original; footnote omitted.)

See also: McCormick on Evidence, § 91 at 191 and § 93 at 194-95 (2d ed. 1972); Comment, *supra,* 9 U. C. D. L. Rev. at 496-502, 509-511, 518-520. This Court has also recognized that the attorney-client privilege is a defensive shield and not an offensive sword. *In re Niday,* 15 Idaho 559, 566, 98 P. 845 (1908). Here, in support of her defense to the action for specific performance, Mrs. Spencer "testified" both to her communications with her attorneys throughout the settlement process and to the nature of their relation with her while discharging their duties as her attorneys. Having attacked the settlement agreements by this evidence, appellants then sought to prevent respondents from asking certain questions of appellant Louise Spencer's former attorneys, who were the other participants to the conversations so exposed and whose reputation and professional integrity were impugned.

In these circumstances, appellant Louise Spencer's testimony impliedly consented to the disclosure of information she was otherwise privileged to withhold. Fairness requires that what she had disclosed could not later be withheld. Moreover, having herself disclosed communications and conduct otherwise privileged from disclosure, the rationale behind the privilege would no longer be served by recognizing appellant Louise Spencer's efforts to invoke it as a bar to the testimony of her former attorneys.

The preceding application of the general principles governing the attorney-client privilege to the circumstances

of this case is not unique. Many cases quite analogous to this one have been decided by other courts. In *Hunt v. Blackburn,* 128 U. S. 464, 9 S. Ct. 125, 32 L. Ed. 488 (1888), the United States Supreme Court had occasion to decide a question quite similar to the one we decide today. The Court there said:

> "Defendant Blackburn insists, however, in her answer, that the part she took in the litigation of these two cases was the result of misplaced confidence in her counsel, by whom she alleges she was deceived, misadvised, and misled; that she was ignorant of her rights; and that she ought not to be held estopped in the premise; while at the same time it is objected on her behalf that her attorney, on the ground of privileged communications, should not be permitted to defend himself by testifying to the facts and circumstances under which he advised her, and the advice which he actually gave.
>
> "The rule which places the seal of secrecy upon communications between client and attorney is founded upon the necessity, in the interest and administration of justice, of the aid of persons having knowledge of the law and skilled in its practice, which assistance can only be safely and readily availed of when free from the consequences or the apprehension of disclosure. But the privilege is that of the client alone, and no rule prohibits the latter from divulging his own secrets. And if the client has voluntarily waived the privilege, it cannot be insisted on to close the mouth of the attorney. When Mrs. Blackburn entered upon a line of defense which involved what transpired between herself and Mr. Weatherford, and respecting which she testified, she waived her right to object to his giving his own account of the matter." 128 U. S. at 470-471, 9 S. Ct. at 127.

This same reasoning as to the facts here in question has been upheld by the appellate courts of several states

which have been called upon to decide this question. *See: Rose v. Crawford,* 37 Cal. App. 664, 667, 174 P. 69, 70 (1918); *State Compensation Ins. Fund v. Foulds,* 167 Colo. 123, 445 P. 2d 716, 718 (1968); *Fearnley v. Fearnley,* 44 Colo. 417, 98 P. 819, 823 (1908); *Kelley v. Cummens,* 143 Iowa 148, 121 N. W. 540, 541-42 (1909); *Houser v. Frank,* 186 Kan. 455, 350 P. 2d 801, 804 (1960); *Jackson v. Swift & Co.,* 151 So. 816, 818 (La. App. 1934); *Leverich v. Leverich,* 340 Mich. 133, 64 N. W. 2d 567, 568 (1954); *Everett v. Everett,* 319 Mich. 475, 29 N. W. 2d 919, 922 (1947); *In re Arnson Estate,* 2 Mich. App. 478, 140 N. W. 2d 546, 549-50 (1966); *Chase v. Chase,* 78 R. I. 278, 81 A. 2d 686, 688 (1951); *McClure v. Fall,* 42 S. W. 2d 821, 824 (Tex. Civ. App. 1931), aff'd 67 S. W. 2d 231 (Tex. 1934); *Grant v. Harris,* 116 Va. 642, 82 S. E. 718, 720 (1914). *See generally:* Annot., 51 A. L. R. 2d 521 (1957); 8 Wigmore on Evidence, *supra;* McCormick on Evidence, *supra*; Bell, Handbook of Evidence for the Idaho Lawyer, 71-73 (2d ed. 1972); Comment, *supra,* 9 U. C. D. L. Rev. 477 (1976).

Our reading of appellant Louise Spencer's affidavit, her sole evidence in this case, convinces us that the trial court did not err in admitting into evidence the testimony of Mrs. Spencer's former attorneys. By testifying to privileged communications, and by making an issue of her defense the privileged matter of her relation with her former attorneys, appellant Louise Spencer waived the attorney-client privilege for all communications relevant to the settlement process and the conduct of her former attorneys. Her former attorneys were properly permitted to testify.

The appellants also attack the judgment of the trial court on the ground that the findings of fact, conclusions

of law and judgment are not supported by substantial, competent evidence. The basis of their attack is their argument that the testimony of appellant Louise Spencer's former attorneys was improperly admitted at trial. We have concluded above that this testimony was properly admitted. It would serve no purpose here to recite each of the challenged findings and conclusions and the support for them in the evidence in the record. It is enough to repeat the general principle that factual findings made by a trial court will not be disturbed on appeal when they are supported by substantial, competent, although conflicting evidence. I. R. C. P. 52 (a); *Baker v. Ore-Ida Foods, Inc.*, 95 Idaho 575, 578, 513 P. 2d 627 (1973). The findings of fact, conclusions of law and judgment of the trial court are supported by substantial, competent evidence.

The judgment of the trial court is affirmed in all respects. Respondents are entitled, pursuant to the terms of the settlement agreements, to attorney's fees on appeal in the sum of $3,000.00. Costs to respondents.

McFADDEN, C. J., DONALDSON, SHEPARD and BAKES, JJ., concur.

Supreme Court, U. S.
FILED
OCT 17 1977
MICHAEL RODAK, JR., CLERK

In The

Supreme Court of the United States

October Term, 1977

No. 77-650

LOUISE SPENCER,

Petitioner,

vs.

FLOYD SKELTON, IDAHO LIVESTOCK COMMISSION COMPANY, AND THE IDAHO FIRST NATIONAL BANK,

Respondents.

APPENDICES B & C

LLOYD J. WEBB of
WEBB, BURTON, CARLSON & PEDERSEN

P. O. Box 33
Twin Falls, Idaho 83301

Attorneys for Petitioner

Orval Hansen
Attorney At Law
1775 Pennsylvania Ave. N.W.
Suite 700
Washington, D.C. 20006

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In The

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October Term, 1977

———o———

No. .....

———o———

LOUISE SPENCER,

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FLOYD SKELTON, IDAHO LIVESTOCK COMMISSION COMPANY, AND THE IDAHO FIRST NATIONAL BANK,

Respondents.

———o———

APPENDICES B & C

———o———

APPENDIX B

IN THE SUPREME COURT OF THE STATE OF IDAHO

No. 12250

FLOYD E. SKELTON and IDAHO LIVESTOCK COMMISSION COMPANY, an Idaho Corporation,

Plaintiffs and Respondents,

vs.

LOUISE SPENCER, LELAND SPENCER, CARMEN SPENCER JENSEN, ALEXA SPENCER ELKINGTON, JANET SPENCER, MIRIAM SPENCER, and THE IDAHO FIRST NATIONAL BANK, Executor of the Estate of S. R. Spencer, Deceased,

Defendants,

LOUISE SPENCER and MIRIAM SPENCER,

Defendants and Appellants.

REMITTITUR

District Judge Scoggin, (retired) announced the decision in this cause June 27, 1977, to the effect that the judgment of the District Court of the Seventh Judicial District of the State of Idaho, Bonneville County, is affirmed. Costs to respondents.

IT IS NOW THEREFORE SO ORDERED.

I, R. H. Young, Clerk of the Supreme Court of the State of Idaho, do hereby certify that the attached and foregoing is a true and correct copy of the opinion filed in the above entitled cause July 20, 1977, and now of record in my office.

WITNESS My hand and the seal of this Court July 20, 1977.

/s/ R. H. Young, Clerk

The Idaho Rule as to finality of Judgments of the Idaho Supreme Court is found at Rule 38, Appellate Rules of the Supreme Court of Idaho, which provides the following:

> "A. *Opinions.* The filing of an opinion of a Court shall be the announcement of the opinion. . . .
>
> B. *Finality of Opinions.* Opinions shall become final 21 days after the date of the last of the following events:
>
> 1. The announcement of the opinion;
>
> 2. The announcement of the opinion on rehearing;
>
> 3. The announcement of a modified opinion without a rehearing.
>
> C. *Remittiturs.* When the opinion filed has become final in accordance with this rule, the Clerk of the Supreme Court shall issue and file a remittitur with the District Court. . . ."

APPENDIX C

Received Jan. 23, 1976
Webb, Burton, Carlson & Pedersen

Terry L. Crapo, of
HOLDEN, HOLDEN, KIDWELL, HAHN & CRAPO

P. O. Box 129
Idaho Falls, Idaho 83401
Telephone: A/C 208-523-0620

Attorneys for Plaintiffs

In the District Court of the Seventh Judicial District of the State of Idaho, in and for the County of Bonneville

Civil. No. 20,500

FLOYD E. SKELTON, and IDAHO LIVESTOCK COMMISSION COMPANY, an Idaho corporation,

Plaintiffs,

vs.

LOUISE SPENCER, LELAND SPENCER, CARMEN SPENCER JENSEN, ALEXA SPENCER ELKINGTON, JANET SPENCER, MIRIAM SPENCER, and THE IDAHO FIRST NATIONAL BANK, Executor of the Estate of S. R. Spencer, deceased,

Defendants.

JUDGMENT

This cause came on regularly for trial before the Court, sitting without a jury, on September 8, 1975, with

each of the parties appearing in person or through their duly appointed and acting attorneys, and the Court having heard the testimony and having examined the proofs and evidence offered by the respective parties, and each of the parties having submitted a brief following the trial, and the Court being fully advised in the premises, and having filed herein its Memorandum Decision dated December 1, 1975, and having filed herein its Findings of Fact and Conclusions of Law, and having directed that Judgment be entered in accordance therewith,

NOW, THEREFORE, by reason of the law and findings aforesaid,

IT IS ORDERED, ADJUDGED AND DECREED, that Judgment be entered in favor of the above named plaintiffs, as follows:

1. That specific performance of the settlement agreements Dated May 2, 1973, and entitled "Covenant Not to Sue" and "Covenant Not to Proceed Further and Not to Execute", copies of which are attached to the pleadings herein, be, and the same hereby is, granted.

2. That Louise Spencer, and the Executor of the Estate of S. R. Spencer, deceased, and all of the parties claiming an interest in said estate being parties to the within action and before the Court in this proceeding, it is hereby ordered, adjudged and decreed that the sum of $150,000.00 agreed to be paid by the plaintiff, Idaho Livestock Commission Company, under the terms of the "Covenant Not to Sue", dated May 2, 1973, for the said 127½ shares of its common stock fairly represents the fair market value of said shares of stock; that the sale and transfer of said shares of stock are in the best in-

terests of the Estate of S. R. Spencer, deceased, and each person or claimant having an interest in said estate. A copy of the settlement agreement entitled "Covenant Not to Sue", dated May 2, 1973, together with a copy of this Judgment, shall be filed with the Magistrate's Division of this Court in the Estate of S. R. Spencer, deceased, Case No. 4193. Insofar as said 127½ shares of stock of Idaho Livestock Commission Company constitutes an asset of the Estate of S. R. Spencer, deceased, its sale and transfer to the plaintiff, Idaho Livestock Commission Company, is hereby approved, confirmed and ratified, and The Idaho First National Bank, Executor of said estate, is ordered and directed to transfer and deliver its interest in said shares of stock to said Idaho Livestock Commission Company as herein provided.

3. That the plaintiff, Idaho Livestock Commission Company, an Idaho corporation, upon payment of said purchase price, as herein ordered and directed is hereby awarded the ownership and title of the 127½ shares of its common stock presently held by the defendant, Louise Spencer and The Idaho First National Bank, Executor of the Estate of S. R. Spencer, deceased, free and clear of all claims of any of the parties to this action. Each and every one of the defendants in this action, and all persons claiming under or through them or any of them are forever barred and foreclosed of all right, title, claim, lien or interest in and to said shares of stock, or any portion thereof.

4. The defendant, The Idaho First National Bank, Executor of the Estate of S. R. Spencer, deceased, is hereby ordered and directed to deliver to the Clerk of this Court the certificate or certificates representing the

said 127½ shares of common stock of the plaintiff, Idaho Livestock Commission Company, properly endorsed for transfer. The defendant, Louise Spencer, is hereby ordered and directed to execute and deliver to the Clerk of this Court a stock power in the form attached to this Judgment, transferring her interest, if any, in the said 127½ shares of common stock of the plaintiff, Idaho Livestock Commission Company. In the event the defendant, Louise Spencer, shall fail to execute and deliver said stock power to the Clerk of this Court within twenty-one (21) days after this Judgment becomes final, then and in such event the Clerk of this Court is directed to execute said stock power on her behalf, pursuant to the provisions of this Judgment. The Clerk of this Court shall thereupon deliver said endorsed certificate or certificates representing said 127½ shares of common stock and said executed stock power to the plaintiff, Idaho Livestock Commission Company, upon the payment by said plaintiff to the Clerk of this Court of the sum of $125,000.00 as provided in paragraph 6. of this Judgment. In the event of the failure of either of said defendants to comply with the provisions of this paragraph, the Court may issue such further protective orders as it shall deem necessary to carry out the terms of this Judgment.

5. With respect to lawsuit No. 13,674, Louise Spencer, et al., plaintiffs v. Floyd E. Skelton, et al., defendants, Seventh Judicial District Court of the State of Idaho, in and for the County of Bonneville, IT IS ORDERED, as follows:

A. The defendant, Louise Spencer, and the defendants, Leland Spencer, Carmen Spencer Jensen, Alexa Spencer Elkington, Janet Spencer, and Miriam

Spencer (hereinafter referred to as the "Spencer Children") and any person acting for them or on their behalf or on behalf of the Estate of S. R. Spencer, deceased, are hereby enjoined and prohibited from proceeding further in said pending lawsuit against the plaintiff, Floyd E. Skelton, or any of the following named parties: Floyd E. Skelton and M. R. Skelton, President and Director of Idaho Livestock Auction Company; Floyd E. Skelton and M. R. Skelton, partners of Skelton-Spencer Trading Company; M. R. Skelton, individually; Idaho Auction Company, a corporation; Idaho Livestock Auction, Inc.; Floyd E. Skelton and Leon Skelton, doing business as Idaho Livestock Auction, a partnership; Floyd E. Skelton, doing business as Skelton's Trading Company; and Leon Skelton, individually. Said defendants are further enjoined and prohibited from levying or suing out an execution, attachment or other legal remedy against the plaintiff, Floyd E. Skelton, and the other above named parties, or in any manner affecting collection on any judgment entered in said lawsuit. This Judgment shall not in any way limit or restrict the right of the plaintiffs in said lawsuit No. 13,674 to continue proceedings therein with respect to the defendant, The Idaho First National Bank, Executor of the Estate of S. R. Spencer, deceased.

B. That the "Covenant Not to Proceed Further and Not to Execute", dated May 2, 1973, is a reasonable compromise of disputed claims and is in the best interests of all of the parties to said lawsuit No. 13,674 and all parties appearing in this lawsuit and

said settlement is binding upon all of the defendants herein and their born or unborn children. A copy of said settlement agreement, together with a copy of this Judgment, shall be filed with the Magistrate's Division of this Court in the Estate of S. R. Spencer, deceased, Case No. 4193, there to await the further disposition of the assets of said estate in accordance with the orders of this Court. Insofar as said settlement agreement or the claims settled therein, or the payments made thereunder shall constitute an asset of the Estate of S. R. Spencer, deceased, said settlement is hereby approved, confirmed and ratified with respect to the Estate of S. R. Spencer, deceased, and shall be binding upon said estate and all persons claiming an interest therein. This Judgment shall be dispositive of all issues decided therein with respect to the Estate of S. R. Spencer, deceased, or any persons claiming an interest therein.

C. The defendant, Louise Spencer, is obligated to indemnify and hold harmless the plaintiff, Floyd E. Skelton, from any expense, loss, or damage incurred as a result of any claims or demands made by her, the Executor of the Estate of S. R. Spencer, the "Spencer Children", or by their children, born or unborn, their personal representatives, heirs and assigns, or any one acting for, by or through them, concerning the matters set forth in the agreement, including, but not limited to, the said pending lawsuit known as Case No. 13,674.

6. The plaintiff, Idaho Livestock Commission Company, is ordered to pay to the Clerk of this Court the sum

of $125,000.00, representing the balance of the payments due under the agreement entitled "Covenant Not to Sue", dated May 2, 1973, and representing the purchase price remaining payable for the 127½ shares of said plaintiff's stock ordered delivered hereunder. The plaintiff, Floyd E. Skelton, is ordered to pay to the Clerk of this Court the sum of $32,500.00, representing the balance of the payments due under the agreement entitled "Covenant Not to Proceed Further and Not to Execute", dated May 2, 1973. Said sums shall be held by the Clerk of this Court pursuant to the Order of this Court and said sums shall be divided among the various defendants in this proceeding according to their respective claims and interests as shall be determined by the Order of this Court following a subsequent hearing on the merits of each of said claims.

7. The Clerk of this Court is hereby ordered and directed to pay to the plaintiffs from the sums so deposited with the Clerk of this Court as required in paragraph 6. above, the sum of $16,000.00, representing reasonable attorneys' fees incurred by plaintiffs in this proceeding, together with such additional sum as shall be allowed by the Court as proper costs. All such attorneys' fees and costs shall be allocated and charged against the respective interests of the defendants in said fund in such manner as shall be determined by the Order of this Court following a subsequent hearing on the manner of allocation of such fees and costs.

RENDERED AND ENTERED this 21 day of January, 1976.

/s/ Willard C. Burton
District Judge

CERTIFICATE OF MAILING BY CLERK OF COURT

I certify that I am the duly elected and qualified Clerk of the District Court of the Seventh Judicial District of the State of Idaho, in and for the County of Bonneville; that I mailed a copy of the foregoing Judgment to the following attorneys this 22 day of January, 1976:

Lloyd J. Webb, Esq.
Webb, Pike, Burton & Carlson
P. O. Box 33
Twin Falls, Idaho 83301

C. Timothy Hopkins, Esq.
Hopkins and French
P. O. Box 1196
Idaho Falls, Idaho 83401

Arthur L. Smith, Esq.
Albaugh, Smith & Pike
P. O. Box 428
Idaho Falls, Idaho 83401

Terry L. Crapo, Esq.
Holden, Holden, Kidwell, Hahn & Crapo
P. O. Box 129
Idaho Falls, Idaho 83401

/s/ DelRoy C. Bodily
Clerk of District Court

/s/ Irene Harries

(Seal)

Stock Assignment Separate from Certificate

For Value Received, the undersigned hereby sell, assign and transfer unto:

(Please insert Social Security or other identification number of assignee) Idaho Livestock Commission Company,

One Hundred Twenty-seven and one-half (127½) Shares of the ..... Stock of the Idaho Livestock Commission Company Corporation standing in S. R. Spencer name(s) on the books of said Corporation represented by certificate(s) No. 11 for 85 shares, and No. 14 for 42½ shares, herewith and do hereby irrevocably constitute and appoint .....attorney to transfer the said stock on the books of the within named Corporation with full power of substitution.

Dated..... X.....

X.....

.....

.....
Authorized Signature

.....
Title

To Be Completed When Forwarded for Transfer

It is hereby certified that the actual value of the shares of stock hereby transferred is $.....

X.....

The signature(s) on this assignment must correspond with the name(s) on the face of the certificate in every particular, without alteration or enlargement, or any change.

The signature(s) of the assignor(s) must be guaranteed hereon.

N-32

NOTICE OF FILING

I hereby certify that, pursuant to Rule 77 (d), I. R. C. P., Notice is hereby given to the following that the above document was filed of record in the District Court, Bonneville County, this 22 day of January, 1976, to:

Attorney: Counsel of Record

Address: .....

Attorney/Defendant: Counsel of Record

Address: .....

Clerk of the District Court
/s/ Irene Harries, Deputy

Received Jan. 23, 1976

Webb, Burton, Carlson & Pedersen

Terry L. Crapo, of
Holden, Holden, Kidwell, Hahn & Crapo

P. O. Box 129
Idaho Falls, Idaho 83401
Telephone: A/C 208 - 523-0620

Attorneys for Plaintiffs

In the District Court of the Seventh Judicial District of the State of Idaho, in and for the County of Bonneville

Civil No. 20,500

FLOYD E. SKELTON, and IDAHO LIVESTOCK COMMISSION COMPANY, an Idaho corporation,

Plaintiffs,

vs.

LOUISE SPENCER, LELAND SPENCER, CARMEN SPENCER JENSEN, ALEXA SPENCER ELKINGTON, JANET SPENCER, MIRIAM SPENCER, and THE IDAHO FIRST NATIONAL BANK, Executor of the Estate of S. R. Spencer, deceased,

Defendants.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Court having heretofore and on the 1st day of December, 1975, entered its Memorandum Decision in favor of the plaintiffs in the above captioned matter, and being fully advised in the premises, now makes the following Findings of Fact and Conclusions of Law in support of the Judgment to be entered herein:

FINDINGS OF FACT

1. On or about the 16th day of September, 1958, one Stanley R. Spencer died and left as heirs the following: Louise Spencer, his wife; Leland Spencer, Carmen Spencer, Alexa Spencer Elkington, Janet Spencer, and Miriam Spencer, sons and daughters of Stanley R. Spencer and his surviving widow, Louise Spencer. Mr. Spencer died testate and his Will was presented to the Probate Court in Bonneville County, Idaho, for probate. The Idaho First National Bank was appointed the Executor of said estate and still continues to serve in that capacity. The Estate of Stanley R. Spencer is presently being administered in the Magistrate's Division of the District Court of the Seventh Judicial District of the State of Idaho, in and for Bonneville County, Case No. 4193.

2. At the time of his death, Stanley R. Spencer was a partner in the Idaho Livestock Auction Company. Prompted by the terms of a contract entered into between Mr. Spencer and his surviving partners, Floyd E. Skelton and M. R. Skelton, Stanley R. Spencer's interest in the Livestock Auction Company partnership was offered for sale by the Executor of the estate and was purchased individually by the surviving members of the partnership for the sum of $167,517.55. The sale was made to the said individuals, the surviving partners, by The Idaho First National Bank, Executor of the Estate of S. R. Spencer, deceased, on March 31, 1961, and on that date an Order confirming such sale was entered in the Probate Court of Bonneville County, State of Idaho.

3. The defendant, Louise Spencer, felt that the amount offered for the sale of the Spencer partnership interest was so inadequate as to work a fraud upon her and her children. On March 16, 1964, Louise Spencer, along with three of her children, namely, Alexa Spencer, Janet Spencer and Miriam Spencer, by her guardian ad litem A. W. Naegle (Miriam Spencer then not having attained her majority), brought suit in the District Court of the State of Idaho, in and for Bonneville County, Case No. 13,674, against Floyd E. Skelton, and The Idaho First National Bank, as Executor of the Estate of S. R. Spencer, deceased, and others, alleging, among other things, that the said sale of the partnership interest was illegal and void, and seeking damages, interest, and attorneys' fees, or in the alternative that the sale be vacated, set aside and declared void. The suit also sought an accounting of the partnership interest.

4. The other two children of S. R. Spencer and Louise Spencer, namely, Leland Spencer and Carmen Spencer, having been named as defendants in said suit, thereafter joined in said suit as plaintiffs.

5. After several preliminary skirmishes and hearings, and after one appeal to the Idaho Supreme Court, the case was finally set for trial in the District Court of the Seventh Judicial District for the County of Bonneville, State of Idaho, on the 1st day of May, 1973. The trial was set in the District Court, before a jury, Judge Willard C. Burton presiding. On the morning of May 1, 1973, at the time set for the commencement of trial the Judge was present in the Courtroom, together with a jury panel. Also present at that time were the attorneys for the plaintiffs, Ray W. Rigby and Gordon S. Thatcher, and attorneys for the defendants, being William S. Holden and other members of the firm of Holden, Holden, Kidwell, Hahn & Crapo, representing Floyd Skelton and the Skelton interests, and A. L. Smith, representing The Idaho First National Bank as Executor of the Estate of S. R. Spencer, deceased.

6. A jury was selected on May 1, 1973, and sworn and the cause was recessed for that day. On May 2, 1973, before commencement of opening statements to the jury, the Court was approached by the attorneys and informed that they might be able to settle the matter without a trial. They requested that the commencement of trial be postponed while they entered into negotiations with regard to settlement.

7. The members of the jury, together with the Judge, waited in the Courtroom until 3:00 or 4:00 o'clock

in the afternoon on May 2, 1973, before they were finally told that it appeared that a settlement would be reached and the jury was therefore excused.

8. During the next several days, the terms of the settlement were reduced to writing and were signed by the parties to this action. There were two basic settlement documents. One agreement was entitled "Covenant Not to Proceed Further and Not to Execute", dated May 2, 1973, a copy of which is attached to the pleadings in this matter. The other document was entitled "Covenant Not to Sue", dated May 2, 1973, a copy of which is attached to the pleadings in this matter.

9. By the terms of the "Covenant Not to Proceed Further and Not to Execute", the plaintiff, Floyd E. Skelton, agreed to pay the defendant, Louise Spencer, the sum of $5,000.00 upon the execution of the agreement and an additional $32,500.00 at such time as she completed performance of the terms and conditions of the said agreement on her part to be performed. The Court finds that the plaintiff, Floyd E. Skelton, did in fact pay the sum of $5,000.00 to the defendant, Louise Spencer, upon the execution of the settlement document and that the plaintiff, Floyd E. Skelton, has tendered to the Court and the defendant, Louise Spencer, the sum of $32,500.00 to be paid upon performance and completion of the terms of the agreement to be performed by the said defendant.

10. The Court finds that by the terms and provisions of the settlement agreement entitled "Covenant Not to Proceed Further and Not to Execute", the defendant, Louise Spencer, agreed as follows:

A. That neither she nor the defendants, the Spencer Children, would proceed further in the said pending lawsuit Case No. 13,674 against the plaintiff, Floyd E. Skelton, nor any other party named in said lawsuit as a defendant, except the defendant, The Idaho First National Bank, Executor of the Estate of S. R. Spencer, deceased; nor would she or the Spencer Children levy execution or otherwise effect collection on any judgment entered in said lawsuit.

B. That neither she nor the defendants, the Spencer Children, nor anyone for them or on their behalf or on behalf of the Estate of S. R. Spencer, deceased, would seek to proceed further in the said pending lawsuit Case No. 13,674, nor levy or sue out an execution, attachment, or other legal remedy against the plaintiff, Floyd E. Skelton, and the other specified parties identified in said agreement.

C. That she would forthwith cause an executed copy of the Covenant Not to Proceed Further and Not to Execute agreement to be filed with the Magistrate's Court of the County of Bonneville, State of Idaho, in the Estate of S. R. Spencer, deceased, and would diligently pursue and secure Court approval of the compromise agreement on behalf of the Spencer Children, and their minor and unborn children.

D. That she would deliver to the plaintiff, Floyd E. Skelton, a certified copy of a Court Order authorizing the compromise of said claims, a counterpart of the agreement signed and properly notarized by the Spencer Children, and an opinion letter from her attorneys as required by the agreement.

E. That she would indemnify and hold harmless the plaintiff, Floyd E. Skelton, and certain other named parties from any expense, loss, or damage incurred as a result of any claims or demands made by her, the Executor of the Estate of S. R. Spencer, the Spencer Children, or by their children, born or unborn, their personal representatives, heirs, and assigns, or any one acting for, by, or through them, concerning the matters set forth in the agreement, including, but not limited to, the pending lawsuit Case No. 13,674.

11. Inventoried in the Estate of S. R. Spencer, as the community property of S. R. Spencer and Louise Spencer, are one hundred twenty-seven and one-half (127½) shares of the capital stock of the plaintiff, Idaho Livestock Commission Company, an Idaho corporation (hereafter referred to as "Plaintiff Corporation"). The defendant, Louise Spencer, claims this stock is her sole and separate property and free of the interest of the Estate of S. R. Spencer or the Spencer children. However, both the estate and the children claim an interest in said shares of stock.

12. On numerous occasions the defendant, Louise Spencer, has demanded that the defendant, Idaho First National Bank, as Executor of the Estate of S. R. Spencer, deceased, bring a shareholder suit against the Plaintiff Corporation, and its majority shareholders, officers, and directors, but the defendant Executor bank has refused to file such a suit.

13. Recognizing that a shareholder action or the pursuit of such claim would be expensive, time consum-

ing, and would dissipate the assets of the Estate of S. R. Spencer and the Plaintiff Corporation, the Plaintiff Corporation entered into an agreement with the defendant, Louise Spencer, and approved by her counsel of record, entitled "Covenant Not to Sue", dated May 2, 1973.

14. By the terms of the "Covenant Not to Sue", the Plaintiff Corporation agreed to purchase said 127½ shares of its capital stock and to pay the sum of $150,000.00 therefor, said stock to be free and clear of all liens and encumbrances. The Court finds that the Plaintiff Corporation did pay the sum of $25,000.00 to the defendant, Louise Spencer, upon the execution of said settlement document and that the Plaintiff Corporation has tendered to the Court and the defendant, Louise Spencer, the sum of $125,000.00, to be paid upon performance and completion of the terms of the agreement required to be performed by the said defendant.

15. The Court finds that by the terms and provisions of the settlement agreement entitled "Covenant Not to Sue", dated May 2, 1973, the defendant, Louise Spencer, agreed as follows:

A. That she should promptly pursue to completion all actions necessary to vest in her a clear title to said 127½ shares of stock and the right to receive the payments due under the "Covenant Not to Sue" agreement to the exclusion of claims of all other interested parties, and would deliver said 127½ shares of stock to the Plaintiff Corporation, free and clear of all liens, claims, and encumbrances.

B. That she would promptly secure an approval of the "Covenant Not to Sue" from an Idaho court of competent jurisdiction on behalf of the Spencer Children and their minor children and unborn children.

C. That she would promptly deliver a certified copy of such order of said court of competent jurisdiction, together with her attorneys' opinion as required by the agreement, to the Plaintiff Corporation.

D. That she would not sue or bring action against the Plaintiff Corporation or certain other named parties for any cause, except for the enforcement of the "Covenant Not to Sue" agreement and the agreement identified in Count III of the Complaint in this action.

E. That she would indemnify and hold harmless the Plaintiff Corporation and certain other named parties from any expense, loss or damage incurred as a result of claims or demands hereafter made by her, or made by the defendant The Idaho First National Bank, as Executor of the Estate of S. R. Spencer, or the Spencer Children, or their born or unborn children, or heirs and assigns, or any one acting for, by or through them, concerning said 127½ shares of stock of Plaintiff Corporation or any related actions.

F. That she would pursue with diligence to final completion all covenants on her part contained in said "Covenant Not to Sue" agreement and that the Plaintiff Corporation is entitled to specific performance of the terms of said agreement.

16. Following the execution of both of said settlement agreements by the parties and the payment by the plaintiffs to the defendant, Louise Spencer, of the sums above described, the plaintiffs thereafter made both written and oral demands upon the defendant, Louise Spencer, through her attorneys of record, for the performance of the remainder of the provisions of the settlement agreements. The requests for performance of the settlement agreements were rebuffed by Louise Spencer and she has refused to perform according to the terms of the said agreements.

17. Following the refusal of Louise Spencer to perform according to the terms of the said settlement agreements, this lawsuit was commenced by the plaintiffs, requesting that the Court find the said settlement agreements to be binding upon Louise Spencer, determining title to the said shares of stock of the Plaintiff Corporation, and ordering the defendants to carry out the terms of the said settlement agreements.

18. Louise Spencer has answered the Complaint of the plaintiffs in this action, contending that the settlement reached was unfair, inadequate and improper and that she should not be bound by the terms of the said settlement agreements. She urges the Court to find the terms of the said settlement agreements to be grossly inadequate, to release her from the terms of the said settlement agreements, and to reopen the said original lawsuit and set it for trial.

19. Trial of this action was had before District Judge Willard C. Burton, sitting without a jury, in Idaho Falls, Idaho, on September 8, 1975. Louise Spencer was not

present in the Courtroom. However, an Affidavit prepared by her was read into the record as her testimony. All parties stipulated that the Affidavit could be accepted as her evidence in the case and all parties waived the right to cross-examination as to the testimony presented in the Affidavit. At the close of the trial the parties were each requested to submit briefs and each party has done so.

20. The Court finds that on May 2, 1973, the attorneys for the plaintiffs and the attorneys for Louise Spencer did get together in an attempt to negotiate a settlement of said lawsuit, Case No. 13,674. Although Louise Spencer has denied that she was kept informed of the settlement negotiations, the evidence against her is overwhelming on this point and the Court finds that Louise Spencer was consulted frequently throughout each day with regard to each step in the negotiations and that her approval was sought and obtained on each point before any decision was made.

21. Although Louise Spencer in her said Affidavit now contends that the terms of said settlement agreements reached in the settlement were grossly inadequate, the Court finds that her attorneys advised her prior to May 2, 1973, that a total settlement of $150,000.00 for all claims would be quite fair and she authorized a settlement in this range. The settlement actually negotiated and concluded amounted to the sum of $187,000.00, which the Court finds to be larger than the amount that Louise Spencer had advised her attorneys would be acceptable to her.

22. The Court further finds that based upon all of the evidence presented to the Court, the amount of the

settlement was fair and adequate under all of the circumstances and was actually higher than might have been recovered had trial proceeded. The amount of the settlement to be paid for the 127½ shares of the stock of the plaintiff, Idaho Livestock Commission Company, fairly represented its fair market value.

23. In her said Affidavit, Louise Spencer had charged that she was displeased with the settlement, that she was induced to make the settlement by her attorneys, who so abused her and wore her out that she finally signed the settlement documents simply to get it over with. The Court specifically finds against the defendant, Louise Spencer, on this factual matter, and finds that Louise Spencer voluntarily signed the settlement agreement, free of threats, abuse or coercion, and that at the time of signing said settlement agreements she was pleased with the settlement.

24. In a letter written by Louise Spencer to her then attorneys on the 9th day of May, 1973, more than a week after the trial and settlement, she said: "I hired you and Ray to resolve the matter with Floyd and the bank. On this you are doing and have done a most excellent job." Then, on the 14th day of May, 1973, she wrote another letter to her attorneys in which she stated: "I am pleased with your painstaking work resolving the matter with Floyd, and with your integrity." Again, on the 18th day of May, 1973, she wrote another letter to her attorneys in which she said: "In the final analysis we won the case because of what you take for granted, your integrity."

25. In view of these statements by Louise Spencer at her home in Denver, Colorado, at a time sufficiently

removed from the trial for her to have recovered from the effects thereof and while away from the attorneys whom she said had influenced her in the decision to settle, the Court is unable to find that at the time the said settlement agreements were executed Louise Spencer was displeased with their terms, or that she had objected to their terms, or that she signed the said settlement agreements only because her attorney insisted upon it. To the contrary, the Court finds that Louise Spencer approved the settlement and signed the said settlement agreements of her own free will and choice after having been fully informed of the terms and conditions thereof.

26. The Court finds that at some time after May 18, 1973, Louise Spencer did change her mind and did become convinced that the settlement as set out in said settlement agreements was unfair. On July 27, 1973, Louise Spencer discharged her attorneys and she thereafter refused to recognize the terms of the said settlement agreements. She has since that date claimed that the amount of the settlement was grossly inadequate and unfair. She has offered no evidence, however, beyond her mere assertion of that fact, to show that the terms of said settlement agreements were grossly inadequate and unfair.

27. The evidence presented to the Court is conclusive that the settlement reached as set out in said settlement agreements was a result of compromise by both sides and was a voluntary agreement by the parties on both sides. The Court specifically finds that the settlement reached as set out in said settlement agreements was fair and just and was equitable to both parties. The Court further finds that the said settlement agreements should be enforced according to their terms and provisions.

28. The 127½ shares of stock of the Plaintiff Corporation are a unique asset and of particular value to the Plaintiff Corporation, and the Plaintiff Corporation therefore has no adequate remedy at law for the breach of contract by the defendant, Louise Spencer.

29. The defendant, Miriam Spencer, has been served with a Summons, together with a copy of the Complaint, in the manner required by law and has failed to appear or otherwise defend in this matter. Her default has been entered according to law and judgment shall be entered against her accordingly.

30. The defendants, Leland Spencer, Carmen Spencer Jensen, Alexa Spencer Elkington, and Janet Spencer, hereafter referred to as the Spencer Children, and the defendant, The Idaho First National Bank, Executor of the Estate of S. R. Spencer, deceased, have all appeared in this proceeding and participated in the trial thereof. Each of said defendants had agreed and stipulated that the plaintiffs may recover judgment in this matter against the defendant, Louise Spencer, as prayed for in the Complaint on file herein and against them with respect to the determination of title to the said 127½ shares of stock of the Plaintiff Corporation and with respect to the settlement of said lawsuit No. 13,674. Said defendants have stipulated and agreed that the Court may award a good and clear title to the said 127½ shares of stock to the Plaintiff Corporation upon the payment into Court of the balance of the purchase price stipulated in the said settlement agreements.

31. Each of the defendants described in paragraph 30. above claims an interest in the money remaining payable under the said settlement agreements. However, they recognize that the interests they claim did not pertain to the plaintiffs and the prayer of the Complaint herein. Accordingly, said defendants described in paragraph 30. above have stipulated and agreed that the Court may enter judgment in favor of the plaintiffs, and order the payment to the Clerk of the District Court of the sums remaining payable by the plaintiffs under the terms of the said settlement agreements, there to await the further decision of this Court with respect to allocation or distribution of said sums among the defendants according to their respective interests after a full hearing on the merits.

32. By reason of the failure of the defendant, Louise Spencer, to perform according to the terms and provisions of the said settlement agreements, the plaintiffs have been required to retain the services of a firm of attorneys for the purpose of enforcing the terms of said settlement agreements and of bringing this action. Each of the settlement agreements specifically provides that the defendant, Louise Spencer, will indemnify and hold the plaintiffs harmless of and from all such costs and expenses. The defendant, Louise Spencer, is therefore obligated to pay to the plaintiffs the reasonable costs and expenses, including a reasonable attorneys' fee, expended by plaintiffs in enforcing the terms of said settlement agreements.

33. The plaintiffs and the defendant, Louise Spencer, have stipulated and agreed that in the event the Court finds that the defendant, Louise Spencer, is obligated to pay the plaintiffs a reasonable attorneys' fee and costs, then and in such event the Court may determine a reasonable attorneys' fee in its own discretion, without need for

an evidentiary hearing. The Court being fully advised in the premises finds that a reasonable attorneys' fee for the services rendered in connection with this matter by plaintiffs' counsel is the sum of $16,000.00.

CONCLUSIONS OF LAW

1. Each of the Findings of Fact separately stated above is also specifically adopted and approved as a Conclusion of law.

2. The defendant, Louise Spencer, approved and entered into the settlement agreements dated May 2, 1973, and entitled "Covenant Not to Sue" and "Covenant Not to Proceed Further and Not to Execute" as her voluntary acts and of her own free will and choice, without coercion, abuse or force of any type or nature. The defendant, Louise Spencer, was ably assisted by competent counsel and was fully informed of the terms and conditions of the settlement agreements before she signed them as her voluntary act.

3. The amount of the settlement to be paid by the plaintiffs is fair and adequate and represents a just compromise of the disputes between the parties. The amount of the settlement to be paid for the 127½ shares of stock of Idaho Livestock Commission Company fairly represents its fair market value and is an adequate consideration.

4. The Court having found that the settlement reached was fair and just and that the settlement agreements described in paragraph 2. above were freely entered into, without coercion or force of any type, and that the terms of said settlement agreements are fair and equitable,

the Court concludes that said settlement agreements should be enforced according to their terms and provisions and that the plaintiffs are entitled to a judgment in their favor enforcing the terms of said agreements.

5. The plaintiff, Idaho Livestock Commission Company, upon payment of the money as required in paragraph 8. hereof, is entitled to an award of the ownership and title of the 127½ shares of its common stock presently held by the Estate of S. R. Spencer and the defendant, Louise Spencer, free and clear of all claims of any of the parties to this action, and each of the defendants and all persons claiming under or through them is barred and foreclosed of any and all right, title, interest claim, or lien of any type or nature whatsoever in said shares of stock. The said plaintiff is entitled to a judgment requiring the defendants, Louise Spencer, and The Idaho First National Bank, Executor of the Estate of S. R. Spencer, deceased, to deliver the certificates representing said shares of stock, properly endorsed, or with properly executed stock powers, to the Clerk of the District Court for delivery to the Plaintiff Corporation upon payment of the monies required to be paid under paragraph 8. hereof. Upon the failure of said defendants to endorse and deliver said shares of stock or stock powers within such time as the Court may provide, the Clerk of the District Court may be authorized to endorse and deliver said shares of stock and stock powers, and the Court may enter such other protective orders with respect to said shares of stock as the Court may deem proper.

6. The Executor of the Estate of S. R. Spencer, deceased, and all of the parties claiming an interest in said estate being before the Court in this proceeding, and the

Court having specifically found that the amount agreed to be paid by the plaintiff, Idaho Livestock Commission Company, for the said 127½ shares of its common stock fairly represents the fair market value of said shares of stock, the Court now concludes as a matter of law that the sale and transfer of said shares of stock is in the best interests of the Estate of S. R. Spencer, deceased, and each person or claimant having an interest in said estate. Accordingly, insofar as the said 127½ shares of stock of Idaho Livestock Commission Company constitutes an asset of the Estate of S. R. Spencer, deceased, the plaintiffs are entitled to a judgment, that the sale and transfer to the plaintiff, Idaho Livestock Commission Company, should be approved, confirmed and ratified and that The Idaho First National Bank, Executor of said estate, may be ordered and directed to transfer and deliver its interest in said shares of stock as herein provided. The judgment shall further provide that a copy of the settlement agreement entitled "Covenant Not to Sue", dated May 2, 1973, together with a copy of the Judgment, shall be filed with the Magistrate's Division of this Court in the Estate of S. R. Spencer, deceased, Case No. 4193.

7. The plaintiff, Floyd E. Skelton, is entitled to an Order and Judgment of this Court specifically enforcing the terms and provisions of the "Covenant Not to Proceed Further and Not to Execute", dated May 2, 1973, including specific provisions that:

A. Neither the defendant, Louise Spencer, nor any of the Spencer Children, or any person acting for them or on their behalf or on behalf of the Estate of S. R. Spencer, deceased, shall proceed further in the pending lawsuit Case No. 13,674 against the plaintiff, Floyd E. Skelton, nor any other party named in said settlement agreement, nor shall said defendants or any person acting for them or on their behalf or on behalf of the Estate of S. R. Spencer, deceased, levy or sue out an execution, attachment, or other legal remedy against the plaintiff, Floyd E. Skelton, or any other party named in said settlement agreement, or in any manner effect collection against them on any judgment entered in said lawsuit. Such judgment shall not in any way limit or restrict the right of the plaintiffs in said lawsuit Case No. 13,674 to continue proceedings therein with respect to the defendant, The Idaho First National Bank, Executor of the Estate of S. R. Spencer, deceased.

B. The "Covenant Not to Proceed Further and Not to Execute", dated May 2, 1973, is a reasonable compromise of disputed claims and is in the best interests of all the parties to said lawsuit Case No. 13,674, and all parties appearing in this lawsuit and said settlement is binding upon all of the defendants herein and their born or unborn children. A copy of said settlement agreement, together with a copy of the Judgment shall be filed with the Magistrate's Division of this Court in the Estate of S. R. Spencer, deceased, Case No. 4193, there to await the further disposition of the assets of said estate in accordance with the orders of this Court. Insofar as said settlement agreement, or the claims settled therein, or the payments made thereunder shall constitute an asset of the Estate of S. R. Spencer, deceased, the plaintiff is entitled to an order and judgment ap-

proving, confirming and ratifying said settlement with respect to the Estate of S. R. Spencer, deceased, and holding that said judgment is now binding upon said estate and all persons claiming an interest therein. Such judgment shall be dispositive of all issues decided herein with respect to the Estate of S. R. Spencer, deceased, or any persons claiming an interest therein.

C. The defendant, Louise Spencer, is obligated to indemnify and hold harmless the plaintiff, Floyd E. Skelton, from any expense, loss, or damage incurred as a result of any claims or demands made by her, the Executor of the Estate of S. R. Spencer, the "Spencer Children", or by their children, born or unborn, their personal representatives, heirs, and assigns, or any one acting for, by or through them, concerning the matters set forth in said settlement agreement, including, but not limited to, the pending lawsuit known as Case No. 13,674.

8. That the plaintiff, Idaho Livestock Commission Company, shall be required to pay to the Clerk of this Court the sum of $125,000.00, representing the balance of the payments due under the agreement entitled "Covenant Not to Sue", dated May 2, 1973, and representing the balance of the purchase price remaining payable for the 127½ shares of said plaintiff's stock which is to be ordered to be endorsed and delivered to said plaintiff. The plaintiff, Floyd E. Skelton, shall be required to pay to the Clerk of this Court the sum of $32,500.00, representing the balance of the payments due under the agreement en-

titled "Covenant Not to Proceed Further and Not to Execute", dated May 2, 1973. Said sums shall be held by the Clerk of this Court pursuant to the Order of this Court and said sums shall be divided among the various defendants in this proceeding according to their respective claims and interests as shall be determined by the Order of this Court following a subsequent hearing on the merits of each of said claims.

9. That the Clerk of this Court shall be ordered and directed to pay to the plaintiffs from the sums so deposited with the Clerk of this Court as required in paragraph 8. above, the sum of $16,000.00, representing reasonable attorneys' fees incurred in this proceeding, together with such additional sum as shall be allowed by the Court as proper costs. All such attorneys' fees and costs shall be allocated and charged against the respective interests of the defendants in said fund in such manner as shall be determined by the Order of this Court following a subsequent hearing on the manner of allocation of such fees and expenses.

10. That Judgment should be entered in accordance with the foregoing Findings of Fact and Conclusions of Law.

ENTERED at Rexburg, Idaho, this 21 day of January, 1976.

/s/ Willard C. Burton
District Judge

CERTIFICATE OF MAILING BY CLERK OF COURT

I certify that I am the duly elected and qualified Clerk of the District Court of the Seventh Judicial District of the State of Idaho, in and for the County of Bonneville; that I mailed a copy of the foregoing Findings of Fact and Conclusions of Law to the following attorneys this 22 day of January, 1976:

Lloyd J. Webb, Esq.
Webb, Pike, Burton & Carlson
P. O. Box 33
Twin Falls, Idaho 83301

C. Timothy Hopkins, Esq.
Hopkins and French
P. O. Box 1196
Idaho Falls, Idaho 83401

Arthur L. Smith, Esq.
Albaugh, Smith & Pike
P. O. Box 428
Idaho Falls, Idaho 83401

Terry L. Crapo, Esq.
Holden, Holden, Kidwell, Hahn & Crapo
P. O. Box 129
Idaho Falls, Idaho 83401

/s/ DelRoy C. Bodily
Clerk of District Court

/s/ Irene Harries

(SEAL)

Case No. ....., Filed 9 a.m. March 8, 1976

DelRoy C. Bodily, Clerk

By I. H., Deputy Clerk

Terry L. Crapo, of
HOLDEN, HOLDEN, KIDWELL, HAHN & CRAPO

P. O. Box 129
Idaho Falls, Idaho 83401
Telephone: A/C 208-523-0620

Attorneys for Plaintiffs

In the District Court of the Seventh Judicial District of the State of Idaho, in and for the County of Bonneville

Civil No. 20,500

FLOYD E. SKELTON, and IDAHO LIVESTOCK COMMISSION COMPANY, an Idaho corporation,

Plaintiffs,

vs.

LOUISE SPENCER, LELAND SPENCER, CARMEN SPENCER JENSEN, ALEXA SPENCER ELKINGTON, JANET SPENCER, MIRIAM SPENCER, and THE IDAHO FIRST NATIONAL BANK, Executor of the Estate of S. R. Spencer, deceased,

Defendants.

ORDER AMENDING FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Motion to Amend Findings of Fact and Conclusions of Law and related Motions of the defendants, Louise Spencer and Miriam Spencer, and the Motion to Amend Findings of Fact and Conclusions of Law of the

defendant, Idaho First National Bank, Executor of the Estate of S. R. Spencer, have duly come before the Court for hearing, in Chambers, pursuant to notice, on Monday, March 1, 1976, with the plaintiffs appearing through their attorney, Terry L. Crapo, and the defendants, Louise Spencer and Miriam Spencer, appearing through their attorney, Lloyd J. Webb, and the defendant, Idaho First National Bank, appearing through its attorney, A. L. Smith, and the Court having heard the argument of counsel and being fully advised in the premises,

IT IS ORDERED, that the FINDINGS OF FACT AND CONCLUSIONS OF LAW entered by the Court on January 21, 1976, in the above entitled action, be, and they hereby are, amended as follows:

A. Finding 2., page 2, is hereby amended to read as follows:

> "2. At the time of his death, Stanley R. Spencer was a partner in Skelton-Spencer Trading Company, formerly known as the Idaho Livestock Auction Company. Stanley R. Spencer's interest in the Skelton-Spencer Trading Company was offered for sale by the Executor of the estate and was purchased individually by the surviving members of the partnership for the sum of $168,517.77. The sale was made to the said individuals, the surviving partners, by the Idaho First National Bank, Executor of the Estate of S. R. Spencer, deceased, on March 31, 1961, and on that date an Order confirming such sale was entered in the Probate Court of Bonneville County, State of Idaho."

B. Finding 3., page 2, is hereby amended by striking the word "felt" in line 1 of said Finding and substituting the word "believed".

C. Finding 5., page 3, is hereby amended by striking the words "skirmishes and" in line 1 of said Finding.

D. Finding 7., page 4, is hereby amended to read as follows:

> "7. The members of the jury, together with the Judge, waited in the Courtroom until 3:00 or 4:00 o'clock in the afternoon on May 2, 1973, before they were advised that it appeared that a settlement would be reached and the jury was therefore excused."

E. The first sentence in Finding 8., page 4, is amended to read as follows:

> "During the next several days, the terms of the settlement were reduced to writing and were signed by the plaintiffs and the defendant Louise Spencer, and were later signed by the defendant, Miriam Spencer."

F. The last sentence in Finding 11., page 7, is hereby amended to read as follows:

> "However, both the estate and the children, other than Miriam Spencer, claim an interest in said shares of stock."

G. The last two lines of Finding 15.(a), page 8, are amended to read as follows: ". . . -tiff Corporation, free and clear of any liens, claims, and encumbrances."

H. Finding 16., page 10, is hereby amended by striking the word "rebuffed" in the last sentence and substituting therefor the word "refused".

I. Finding 18., page 10, is hereby amended to read as follows:

> "18. Louise Spencer has answered the Complaint of the plaintiffs in this action, contending that there

was never a meeting of the minds nor an agreement of the parties and that the settlement reached was unfair, inadequate and improper, and that she should not be bound by the terms of the said settlement agreements. She urges the Court to find the terms of the said settlement agreements to be grossly inadequate, to release her from the terms of the said settlement agreements, and to reopen the said original lawsuit and set it for trial."

J. Finding 22., page 12, is hereby amended to read as follows:

"22. The Court further finds that based upon all of the evidence presented to the Court, the amount of the settlement was fair and adequate under all of the circumstances and was actually higher than Mrs. Spencer's trial attorneys thought might have been recovered had trial proceeded. The amount of the settlement to be paid for the 127½ shares of the stock of the plaintiff, Idaho Livestock Commission Company, fairly represented its fair market value, including all undistributed earnings allocable to said stock, if any."

K. Finding 29., page 14, is hereby amended to read as follows:

"29. The defendant Miriam Spencer has been served with a Summons, together with a copy of the Complaint, in the manner required by law and has appeared in this matter through her attorney Lloyd J. Webb. The default previously entered against Miriam Spencer has been set aside by the Court and Mr. Webb has been allowed to appear on her behalf."

L. Finding 33., page 16, is hereby amended by the deletion of the sum of $16,000.00 in the last line, and the substitution therefore of the sum of $7,500.00.

M. Conclusion 3., page 17, is hereby amended to read as follows:

"3. The amount of the settlement to be paid by the plaintiffs is fair and adequate and represents a just compromise of the disputes between the parties. The amount of the settlement to be paid for the 127½ shares of stock of Idaho Livestock Commission Company fairly represents its fair market value, including all undistributed earnings allocable to said stock, if any, and is an adequate consideration therefore."

N. Conclusion 6., page 18, is hereby amended by inserting after the word "stock" in line 2, of page 19, the following words: "including all undistributed earnings allocable to said stock, if any."

IT IS FURTHER ORDERED, that except as above provided, and amended, the Motion to Amend Findings of Fact and Conclusions of Law is hereby denied.

IT IS FURTHER ORDERED, that the Motion to Make Additional Findings of Fact and Conclusions of Law and the Motion to Amend Judgment of the defendants, Louise Spencer and Miriam Spencer, is hereby denied.

EXCEPT AS HEREIN AMENDED AND MODIFIED, the Findings of Fact and Conclusions of Law rendered and entered January 21, 1976, are hereby confirmed and approved as amended.

RENDERED AND ENTERED this 3 day of March, 1976.

/s/ Willard C. Burton
District Judge

CERTIFICATE OF MAILING BY CLERK OF COURT

I certify that I am the duly elected and qualified Clerk of the District Court of the Seventh Judicial District of the State of Idaho, in and for the County of Bonneville; that I mailed a copy of the foregoing ORDER AMENDING FINDINGS OF FACT AND CONCLUSIONS OF LAW to the following attorneys this 9 day of March, 1976:

Lloyd J. Webb, Esq.
Webb, Pike, Burton & Carlson
P. O. Box 33
Twin Falls, Idaho 83301

C. Timothy Hopkins, Esq.
Hopkins and French
P. O. Box 1196
Idaho Falls, Idaho 83401

Arthur L. Smith, Esq.
Albaugh, Smith & Pike
P. O. Box 428
Idaho Falls, Idaho 83401

Terry L. Crapo, Esq.
Holden, Holden, Kidwell, Hahn & Crapo
P. O. Box 129
Idaho Falls, Idaho 83401

/s/ DelRoy C. Bodily
Clerk of District Court

/s/ Irene Harries
(Seal)

Supreme Court, U.S.
FILED
DEC 7 1977
MICHAEL RODAK, JR., CLERK

In The

Supreme Court of the United States

October Term, 1977

No. 77-650

LOUISE SPENCER,

Petitioner,

vs.

FLOYD SKELTON, IDAHO LIVESTOCK COMMISSION COMPANY, AND THE IDAHO FIRST NATIONAL BANK,

Respondents.

BRIEF OF RESPONDENTS FLOYD SKELTON AND IDAHO LIVESTOCK COMMISSION COMPANY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

TERRY L. CRAPO
of
HOLDEN, HOLDEN, KIDWELL,
HAHN & CRAPO

P. O. Box 129
Idaho Falls, Idaho 83401

Attorneys for Respondents Floyd Skelton and Idaho Livestock Commission Company

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Respondents.

BRIEF OF RESPONDENTS FLOYD SKELTON AND IDAHO LIVESTOCK COMMISSION COMPANY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

Petitioner's Statement of the Case misstates and omits reference to many significant factual matters. Respondents accordingly submit the following additional information concerning the case:

I. Background

This case was a civil action seeking specific performance of written settlement agreements entered into between

the petitioner and respondents in settlement of an earlier civil case. The primary case was tried on May 1, 1973, and the settlement was affected during the trial. The petitioner later disavowed the settlement agreements and the respondents filed this action for specific performance. The trial of the present case was held in two parts: (1) The plaintiffs' case in chief was presented on May 7, 1975, and the trial was then recessed to permit the petitioner to appear or present evidence through a deposition or affidavit; (2) The remainder of the trial was held on September 7, 1975. The record on appeal consists of three separate transcripts: (1) The clerk's transcript of both parts of the 1975 trial, hereinafter referred to as "Tr. —"; (2) The reporter's transcript of the May trial, hereinafter referred to as "May Tr. —"; and (3) The reporter's transcript of the September trial, hereinafter referred to as "Sept. Tr. —". Portions of the transcript referred to are included in the Appendix.

II. The Primary Case Disposition

Petitioner states that materials necessary to the trial of her orignial case on May 1, 1973, were not available to her at the time of trial and that she and her counsel were not able to proceed with trial or settlement discussions at that time. To the contrary, the Petitioner's counsel for the May 1, 1973, trial testified that he had spent approximately two and one-half (2½) years in preparation for the trial and had the necessary witnesses present and available for the trial:

> (Mr. Thatcher) There had been extensive preparation. We had been in the case approximately two and a half years, and I had spent a major part of my time, over two and a half years, on Mrs. Spencer's matters. On specific trial preparation, we did have a handwriting expert, a document examiner, from Washington, D. C. who was there available to testify, as Mrs. Spencer indicated. We had Harry LeMoyne, who is a competent expert in real estate appraising and with special reference to evaluation of livestock auction properties. . . . We did have a man . . . from the board which governs auctions in Idaho, livestock auctions. . . . We had John Parry, who is a Certified Public Accountant, who had done some preliminary work with us. We had him analyze facts. He was there in the courtroom also prepared to testify. . . . So I would say generally we'd put in a lot of preparation and we were ready for trial. (Sept. Tr. 67-68)

Petitioner advises the Court that the settlement of the case was achieved without offers or negotiations and that she was under the impression that she had to accept her attorneys' settlement proposals. These statements are clearly contradicted by the record. The settlement negotiations commenced on May 1, 1973, and continued late into that night. Several conference calls were held between the respective attorneys, and petitioner's attorneys conversed with her by telephone on several occassions and on at least two occasions late in the evening visited her in person to discuss the settlement negotiations (Sept. Tr. 99-100). Early the next morning, Petitioner and her attorneys went to the offices of the attorneys for the Respondent and were given a library conference room to use as the base of their operations. Negotiations continued throughout the morning and into the afternoon. During this interim the court was kept advised of the settlement discussions and the jury was held in recess (Sept. Tr. 101). A settlement was finally negotiated during the midafternon and agreed upon by all of the parties.

The trial court was orally advised of the settlement and the jury was dismissed late in the afternoon of May 2, 1973 (Sept. Tr. 101). Petitioner fully participated in all of these negotiations and was kept fully advised of all settlement offers. The final settlement actually exceeded the settlement figure she had authorized her attorneys to accept (Sept. Tr. 104-A).

Although the parties had orally agreed upon a settlement amount of $187,500.00 for full settlement of all claims against the Respondents, the preparation of the settlement agreement and covenants not to sue or proceed further involved further drafting and negotiation. Petitioner's claim against The Idaho First National Bank was not to be released, and so it was necessary that the settlement documents be carefully drafted to preserve her claim against the bank (Sept. Tr. 101-106). The settlement documents were redrafted several times, including changes requested by Petitioner's attorneys (Sept. Tr. 104-A).

On Monday, May 7, 1973, the settlement documents had been completed. The documents were carefully and thoroughly read by Mr. Gordon Thatcher, attorney for Petitioner, and by Petitioner herself. Mr. Thatcher and Petitioner then privately discussed the settlement documents and the settlement procedures (Sept. Tr. 113-114). Petitioner and her attorney then each signed all of the settlement documents and Petitioner acknowledged the papers before a Notary Public (Sept. Tr. 115). Petitioner was then taken to the Idaho Falls Airport to catch a Western Airlines flight returning to her home in Denver, Colorado (Sept. Tr. 115).

The settlement documents called for the payment of $30,000.00 as a down payment and this sum was paid on May 7, 1973, by two checks delivered to Petitioner's attorneys (May Tr. 52-54). The checks were deposited in the trust account of Petitioner's attorneys, Rigby & Thatcher, and held subject to her direction. Some of the funds were subsequently disbursed at the order of Petitioner. None of the funds have been returned to Respondents.

During her flight home to Denver, Petitioner wrote a letter to her attorneys, and posted it in Salt Lake City, Utah, on May 7, 1973 (Pl. Ex. R-1; Sept. Tr. 147-148). In her letter, Petitioner praised the work done by her attorneys in settling the lawsuit, stating in part:

> Your task of fighting Floyd is happily resolved. It was tough and you earned your pay and then some. Now you have the bank-executor. There is to be absolutely no flack on other minor issues in this case to disturb your concentration. I won't allow it-absolutely . . . You and Ray are my only *Idaho* attorneys. You'll always be paid on our agreements. And your job is to fight the bank-executor from now on—and only the bank-executor. Since you resolved the log-jam with Floyd so beautifully with such hard work it is only the bank now (Pl. Ex. R-1; Sept. Tr. 148).

Prior to leaving Rexburg, Idaho, in early May, 1973, Petitioner on several occasions told her attorneys and other parties how pleased she was with the settlement (Sept. Tr. 202).

One of the conditions in the settlement documents was a requirement that Petitioner obtain the approval of the settlement by her children, who claimed an interest in the estate. Petitioner's daughter Miriam resides with her in

Denver, Colorado. On May 18, 1973, Petitioner secured Miriam's signature on the settlement documents and then mailed the documents to her attorneys to file with the court when the other signatures were obtained (Sept. Tr. 137-140). At approximately the same time, Petitioner wrote two lengthy letters to her attorney Gordon Thatcher, confirming her approval of the May 1, 1973, settlement, authorizing the collection of the settlement proceeds from Floyd Skelton, and outlining her litigation plans against The Idaho First National Bank (Pl. Ex. R-3 and R-4; Sept. Tr. 155).

On July 28, 1973, Petitioner discharged the firm of Rigby & Thatcher as her attorneys and refused to perform the terms of the settlement agreement. Until that date, some three months after the settlement, there had been no disavowal of the settlement agreement on the part of Petitioner (Sept. Tr. 161-162).

The Respondents served notice of default upon Petitioner on September 7, 1973, and tendered payment of the balance of the settlement proceeds upon performance of the settlement agreements (Pl. Ex. 10 and 11; May Tr. 39). Petitioner refused to perform the settlement and disavowed it.

III. The Present Case

The present case involves only the issue of whether the settlement agreement should be specifically enforced against Petitioner. Petitioner's claims against the Estate of S. R. Spencer and The Idaho First National Bank are still pending in Idaho actions. Respondent's complaint in the present case was filed on December 6, 1973, and Petitioner appeared pro se and filed an Answer and Counterclaim on December 26, 1973. On November 7, 1974, Lloyd Webb, Esq., counsel for Petitioner in this proceeding, entered his appearance in the present case and filed an Amended Answer and Counterclaim (Tr. 81). Thereafter, Mr. Webb vigorously represented Petitioner's interests.

With the exception of Miriam Spencer, all of the Petitioner's children appeared in the present case, asked that the settlement be enforced according to its terms, and claimed an interest in the settlement proceeds (Tr. 180). The Idaho First National Bank also appeared and asked that the settlement be enforced and that settlement monies properly belonging to the Estate of S. R. Spencer, if any, be paid into the estate and administered as part of the estate (Tr. 103).

The trial court properly severed the claims against the settlement proceeds from the present case and tried only the issue of whether the settlement agreement should be enforced. After a number of delays requested by the Petitioner, the case was set for trial on May 7, 1975. Petitioner did not appear at the trial and requested a delay until her health would permit her to attend. Respondents offered evidence and the trial was then recessed until Petitioner could appear and testify. After additional delays, all of the parties (including the Petitioner) stipulated that Petitioner would not have to appear in person and could submit her testimony through an Affidavit, without cross-examination. The remainder of the trial was held on September 8, 1975, and Petitioner's affidavit was read into the record. The affidavit attacked the settlement on several grounds and rebuttal testimony was offered on each of these issues.

On January 21, 1976, the trial court entered its judgment finding that the settlement had been freely entered into by the Petitioner and ordering its specific enforcement (Pet. App. C, p. 4).

Petitioner appealed the judgment to the Idaho Supreme Court on two basic grounds: (1) That Petitioner's former attorneys should not have been permitted to testify in the matter because of the attorney-client privilege; and (2) That the evidence did not sustain the trial court's findings. On June 27, 1977, the Idaho Supreme Court affirmed the decision of the trial court and specifically found that the Petitioner had waived the attorney-client privilege as to the settlement negotiations by attacking the conduct of her attorneys and by herself testifying as to the privileged conversations with her attorneys during the negotiations. The Idaho court also found that the judgment of the trial court was supported by substantial, competent evidence (Pet. App. A, pp. 7, 10).

At no time during the appeal, or during the trial in the Idaho district court, did the Petitioner raise the issues of denial of a jury trial, denial of the right to counsel, or any of the other federal issues described in the Petition before this Court.

———o———

REASONS FOR DENYING THE WRIT

I.

Procedural Matters

A. Failure to Comply With Rule 23

Petitioner has failed to comply with the provisions of Rule 23 (f) of the Rules of this Court in that Petitioner has failed to do any of the following: (1) Specify the stage in the proceedings in the court of first instance and in the appellate court, at which, and the manner in which, the federal questions sought to be reviewed were raised; (2) The method of raising them; and (3) The way in which they were passed upon by the court. The Petition does not show that any federal questions were timely or properly raised so as to give this Court jurisdiction to review the judgment on Writ of Certiorari.

B. Failure to Raise Federal Issues in State Courts

None of the federal questions raised in the Petition for a Writ of Certiorari was raised by the Petitioner in any of the state court proceedings below, nor were they passed upon by the state courts. The judgment, findings of fact and conclusions of law by the trial court (Pet. App. C, pp. 4-35) show that no federal questions were raised or decided by the trial court. The decision of the Idaho Supreme Court (Pet. App. A, pp. 4-10) shows that the only issues presented on appeal were: (1) Whether the trial court erred in admitting into evidence the testimony of the Petitioner's former attorneys; and (2) Whether there was substantial, competent evidence in the record to support the trial court's judgment. No federal questions were raised or decided in the Idaho appeal.

It is well established that this Court will not decide federal constitutional issues raised for the first time in this Court on the review of state court decisions. This Court has held that it is not vested with jurisdiction unless a federal question was raised *and* decided in the state court below. If the record before this Court does not show both of these matters, then appellate jurisdiction fails. *Tacon v. Arizona,* 410 U. S. 351 (1973); *Cardinale v. Louisiana,* 394 U. S 437 (1969); *Safeway Stores, Inc. v. Oklahoma Retail Grocers Assn., Inc.,* 360 U. S. 334 (1959). The federal issues not having been raised below nor decided by the Idaho courts, the requirements of 28 U. S. C., Sec. 1257 (3) have not been met, and this Court does not have jurisdiction to grant the Writ of Certiorari.

II.

Denial of Due Process

A. The Handling of the Litigation by the Idaho Courts

The Petitioner claims that she was denied due process in the trial below because: (1) She was denied the assistance of counsel during the trial; (2) She was not given the opportunity to appear personally; (3) She was not given the opportunity to confront witnesses; and (4) Her counsel was obliged to defend the case without adequate time to prepare the case. None of these issues was raised in either of the Idaho courts, nor has the Petitioner presented any portions of the record below to document any of these claims.

Actually, the record below shows that Petitioner was represented by counsel during each portion of the trial

below and that Petitioner personally agreed to the presentation of her testimony in the case by affidavit, rather than by personal appearance. Respondent's complaint was filed on December 6, 1973, and Petitioner appeared pro se on December 26, 1973. On November 7, 1974, Lloyd Webb, Esq., appeared on behalf of the Petitioner in the case below and thereafter represented her in all proceedings in the trial court and the appeal to the Idaho Supreme Court. The first portion of the trial was held on May 7, 1975, six months after the Petitioner obtained the services of counsel. At that proceeding, Petitioner's attorney suggested that the trial be deferred until a later date or until Petitioner's testimony could be presented in an alternative form:

> Mr. Webb: Your Honor, before the plaintiff proceeds we have prepared and would like to file at this time on behalf of Mrs. Spencer a motion supported by affidavit for a continuance of the trial *or alternatively for the reception of Mrs. Spencer's evidence by deposition* and I would like to present that matter to the court before the plaintiff begins, if I may. (May Tr. 7) (Emphasis added.)

The trial court granted the motion and ordered the Respondents to present their case in chief. The court then recessed the trial until September 8, 1975, to allow the Petitioner an opportunity to appear or present testimony through a deposition. The court suggested that the parties consider allowing the Petitioner to present her testimony through an affidavit (Tr. 197-201).

On May 30, 1975, the parties entered into a stipulation permitting the Petitioner to present evidence in the case through an affidavit and without cross-examination. A portion of the stipulation is as follows:

> The parties stipulate and agree that the testimony of the defendant, Louise Spencer, may be submitted by proper affidavit, to be filed with the Court within thirty (30) days of the date of the filing of this Stipulation with the Court. Each of the parties expressly waives and releases any right of cross-examination of said defendant, Louise Spencer, and agrees that said affidavit may be submitted to the Court and considered by the Court as the testimony of the defendant, Louise Spencer, in this matter.
>
> Following the filing of said affidavit, the Court may promptly set this cause for trial of the remaining issues. Each party may present rebuttal evidence and testimony as they see fit. In the event any other parties present rebuttal evidence or testimony, the defendant, Louise Spencer, waives the right to present any oral testimony by Louise Spencer in surrebuttal. (Tr. 205-206)

The stipulation was signed *individually* by Louise Spencer and by her attorney.

The record before the Court therefore shows that the Petitioner did have counsel during the trial and on appeal, that she was twice given the opportunity to appear personally, that she agreed by stipulation to present her testimony through affidavit without cross-examination, and that her counsel had six months to prepare prior to the first hearing and another four months prior to the second hearing. The record before the Court affirmatively shows that the handling of the case by the Idaho courts provided the Petitioner due process.

B. The Deprivation of Property Without Due Process

Petitioner is apparently trying to argue that the manner of administration of the Estate of S. R. Spencer by The Idaho First National Bank has deprived her of

property without due process. That matter is not an issue in the present case. The present case deals solely with the question of whether the settlement agreement between the Respondents and the Petitioner should be enforced. The trial court expressly reserved ruling on the question of which parties are entitled to receive the monies to be paid by Respondents under the settlement agreement. The parties, including Louise Spencer, had stipulated on April 30, 1975, that the division of the settlement proceeds was to be determined at a later date:

> That in the event the plaintiffs shall be successful upon the trial of this matter and the Court should award judgment to the plaintiffs as prayed for in their Complaint on file herein, then and in such event, all sums due and payable thereunder by the plaintiffs shall be paid to the Clerk of Court by the plaintiffs, said sum to be divided among the respective defendants pursuant to their claims as determined by the Order of the Court at a subsequent hearing.
>
> That the issue of the respective claims of the defendants to all or any of the proceeds to be paid to the Clerk of Court and the division of such monies shall not be decided by the Court at its trial of the matter on May 7, 1975, but shall be reserved until a subsequent evidentiary hearing to be promptly set by the Court, at which time the defendants may present and assert their respective claims to said monies. (Tr. 195)

The monies which were to be paid by Respondents in the settlement represented payment for claims and assets which were included in the Estate of S. R. Spencer. The proceeds were claimed by the Petitioner, by the administrator of the estate, and by the other heirs of the estate. Whether the Petitioner has been deprived of

those assets and the proceeds because of the conduct of the administrator and the heirs is an issue that was excluded from consideration of the court below by the stipulation of the Petitioner. That issue was not presented in the Idaho courts below and cannot therefore be raised in support of the Petition for a Writ of Certiorari.

III.

Equal Protection of Law

Petitioner again claims that she has been denied equal protection of the law because of the manner of the administration of the Estate of S. R. Spencer. She claims this has deprived her of effective representation in the courts. As discussed above, that issue was not raised below and was not decided below. By agreement of the parties that issue was reserved to a subsequent trial.

Petitioner also claims that she was denied "equal protection" because the settlement documents required her to obtain the consent of her children before final payment would be made. It should be noted that the requirement of children's consent was the result of a contractual arrangement freely entered into by the Petitioner and not an obligation imposed upon her by law. Accordingly, there has been no state action resulting in a denial of equal protection of law. It should also be noted that the Petitioner's children claimed an interest in the property which was disposed of in the settlement and it was therefore most appropriate that their consent to the settlement be obtained to avoid further litigation. The validity of the children's claims was expressly reserved

from the trial below and any questions concerning them is not a proper issue to raise in this proceeding.

IV.

The Right of Jury Trial

This Court has not yet decided the question of whether the 7th Amendment to the Constitution of the United States requires State courts to provide the right of jury trial. Petitioner invites the Court to determine that question in the context of this case by claiming the Idaho courts denied her that claimed right. The simple answer to this claim is that Petitioner never asked for a jury trial and the court never was presented with a request for a jury trial. Petitioner was represented by counsel for six months prior to the trial and at no time did counsel ever request a jury trial. The jury trial issue was never raised on the appeal to the Idaho Supreme Court.

The Idaho Supreme Court has held that the right to a civil trial by jury is waived by failure to demand a jury trial within ten days after service of the last pleading directed to an issue. *Meyer v. Whipple,* 94 Idaho 260, 486 P. 2d 271 (1971). This Court has also held that the failure to demand a trial by jury constitutes a waiver of the right to the jury trial, if any such right exists. *Duignan v. United States,* 274 U. S. 195 (1927).

V.

Right to Counsel

It has already been pointed out that the State of Idaho at no time denied Petitioner the right to counsel

in the present case. Petitioner has not referred this Court to any instances in which the trial court or the Idaho Supreme Court refused to hear counsel or restricted Petitioner's use of counsel. To the contrary, the record shows that from November 7, 1974, Petitioner was at all times represented by counsel.

Petitioner also attempts to argue that the rulings in the lower courts which permitted her former attorneys to testify as to matters discussed in the settlement negotiations somehow denied her the right to effective counsel. It is not clear how this evidentiary ruling has anything to do with the representation of Petitioner in the present case by counsel of her own choosing. However, the decision of the Idaho Supreme Court in the case below clearly explains why the trial court was correct when it ruled that the Petitioner had waived her attorney-client privilege when she testified concerning the conduct and statements of her attorneys during the settlement negotiations (Pet. App. A, pp. 1-10).

This Court has repeatedly ruled that state substantive law should be determined by the highest court of the state and that such a determination will not be reviewed unless a constitutional or federal issue is involved. *Hortonville Joint School District No. 1 v. Hortonville Education Association,* 426 U. S. 482 (1976); *Groppi v. Wisconsin,* 400 U. S. 505 (1971). There are no constitutional or federal issues involved in the determination of the waiver of the attorney-client privilege issue. Even if the issue were properly presented, this Court has held on the substantive issue that a client who enters upon a defense which involves what transpired between the client and her

attorney and who voluntarily testifies as to such matters, thereby waives her right to object to the attorney thereafter giving his account of the matter. *Hunt v. Blackburn,* 128 U. S. 464 (1888).

VI.

Abrogation of Contract

Petitioner argues that by judicially enforcing the settlement agreements the State of Idaho is abrogating her contract rights in violation of Article I, Section 10 of the Constitution of the United States. However, that provision of the Constitution is not applicable to the judicial enforcement of the terms of private contracts. This Court held in *Cross Lake Shooting and Fishing Club v. Louisiana,* 224 U. S. 632 (1912) that:

> This Clause (Art. I, Sec. 10), as its terms disclose, is not directed against all impairment of contract obligations, but only against such as results from a subsequent exertion of the legislative power of the state. It does not reach mere errors committed by a state court when passing upon the validity or effect of a contract under the laws in existence when it was made. (224 U. S. at 638)

CONCLUSION

The rules of this Court indicate that generally the Court will grant a Writ of Certiorari only when "a state court has decided a federal question of substance not theretofore determined by this court, or has decided it

in a way probably not in accord with applicable decisions of this court." (Rule 19 (a)). The record before the Court shows that no federal questions were presented to the trial court or the appellate court and that no federal questions were decided by them. Accordingly, the Petition for a Writ of Certiorari to the Supreme Court of the State of Idaho should be denied.

Dated this 5th day of December, 1977.

Respectfully submitted,

HOLDEN, HOLDEN, KIDWELL, HAHN & CRAPO
By TERRY L. CRAPO

P. O. Box 129
Idaho Falls, Idaho 83401

Counsel for Respondents,
Floyd Skelton and Idaho
Livestock Commission Company

APPENDIX

This appendix contains portions of the reporters transcript cited in Respondent's brief.

Sept. Tr. 99-101

(Mr. Thatcher):

. . . We had several conference calls that night. By conference calls, I would get in touch with Mrs. Spencer on the motel telephone and we would discuss the details including the amounts of prospective settlement and other details. We'd get authorization to a point, and I'd get Mr. Rigby and Mr. Holden on the phone and we would discuss it. He would then discuss it with Mr. Skelton and he'd get back again. The course of these negotiations, to the best of my recollection, extended on to two or three in the morning. Now, after a time, and I've forgotten the exact time, I think it may have been even ten or ten-thirty or it may have been later, the switchboard ceased to operate at the Viking Motel, so on at least two occasions I went to the Viking Motel, knocked on Mrs. Spencer's door, and visited with her in the—I think it was the second floor, and it's on the balcony outside the door, about the course of the negotiations. So she was advised throughout. In our last discussion, we had not reached an agreement, we were not that far apart. We indicated that the trial was scheduled for the morning, that we had an early morning meeting scheduled at the Holden law office in Idaho Falls, that she should go there instead of to the courthouse because we were still going to try to settle the case before court reconvened at nine-thirty or ten, whatever the time is that the Court had scheduled. So we had a very late night that night. We had a very early morning the next morning. Not many hours in between. We went to Idaho Falls early, and we resumed negotiations. The negotiations then continued until the trial time, and, as I recall, we contacted the Court and asked for an extension of time. I think we

may have been quite optimistic then. I think we asked the Court to wait until ten o'clock or ten-thirty, something like that. We didn't complete the negotiations. Then they went on with further contacts of the Court and finally an agreement was reached somewhere in the range of three o'clock in the afternoon or three-thirty, thereabouts. At that time we came over to the Court and presented to Judge Burton that we had orally agreed on a settlement of the case, that there were numerous details to be worked out, but we all felt that the jury by then would be prejudiced one way or another. They'd been sitting all day while we were negotiating a settlement. It was agreed that the jury be dismissed and then we proceeded to put in writing the settlement.

Sept. Tr. 104-A-105

(Mr. Thatcher):

Then the bank, we couldn't move them at all, and there were some problems they expressed of getting people together and all the rest of it. So we agreed on the settlement. Then the question was of putting it together, and there had to be settlement documents drawn and, if I recall, the first draft of those were completed that afternoon, which would have been May 2, 1973. The first draft that came in said we were receiving this money from Mr. Skelton, but did not have the kind of language in it which, as a lawyer, I felt should be in it to indicate that it was a covenant and that all rights were reserved against Idaho First National Bank. So we objected to this and we had it changed. I noticed in Mrs. Spencer's affidavit she said she saw that and we didn't, which is not true. I mean we noticed that point and had it corrected. The actual drawing of those documents took several days before they were finally completed, with back and forth negotiations. We left the office in the afternoon or evening, and it could have been evening, of May 2nd, '73, the Holden law office, with the understanding that drafts would be made to arrive at the settlement agreement.

Other points of negotiation which were involved included whether the daughters would be required to sign. Mrs. Spencer was anxious that the daughters not have to sign another agreement. Mr. Holden and Mr. Kidwell, who I think was involved in it also, for Mr. Skelton indicated that they had to have that as part of the settlement. We, in all candor, had to tell Mrs. Spencer that we did not see how you could settle a lawsuit wtih the daughters as parties to the lawsuit without having the daughters a party to the settlement papers. We tried to get it otherwise. We knew that Mr. Holden would represent his client, and in all fairness he's going to have to require that the daughters be on it. So Mrs. Spencer knew at the time of the agreed settlement that the daughters had to be on the papers. . . .

Sept. Tr. 113-115

(Mr. Thatcher):

Q. Now, Mr. Thatcher, do you recall when the settlement papers were finally signed by the parties?

A. The settlement papers were finally signed on the following Monday, which would have been May 7th, as I recall.

Q. Where were they signed?

A. They were signed in the same library conference room which had been our base of operations in all the negotiations.

Q. And who was present at that time?

A. Mrs. Spencer, myself, Bill Holden of your office, and Dorothy Grimmett as a Notary Public from your office.

Q. (By Mr. Crapo) Were you given an opportunity to review the settlement documents, the two covenants?

A. Yes, and the final settlement papers that were signed had some variations, but were not basic-

ally different from papers we'd been working with for several days. I did read them carefully and thoroughly.

Q. Did Mrs. Spencer read them?

A. She read them also, and we discussed them.

Q. Do you know what period of time this took, the reading and discussing?

A. The reading and discussing at the actual signature was not a lengthly period of time. There had been a lot of discussions prior, but it was—they were read and discussed.

Q. Was this in the presence of Mr. Holden and Mrs. Grimmett, or were you left by yourself with Mrs. Spencer to discuss them?

A. Well, the actual signing was in the presence of Mr. Holden and Dorothy, but we had met privately prior on the papers.

Q. So you and Mrs. Spencer met privately to review the documents before she signed them?

A. Yes.

Q. (By Mr. Crapo) And did you, in fact, sign the documents on her behalf as her attorney?

A. I believe there's a place on there for the attorney to sign. As I recall, I did, yes.

Q. Did Mrs. Spencer sign in your presence?

A. Yes, she did.

Q. Did she sign in front of a Notary Public?

A. Yes.

Q. Was she sworn by the Notary Public before she signed?

A. She acknowledged the papers before the Notary Public, yes.

Q. What happened then?

A. Then I took Mrs. Spencer to the plane. She had a plane that was leaving very soon. I drove her out to the airport and put her on the plane.

Sept. Tr. 137-139

(Mr. Thatcher):

Q. When did she first know or when did you first advise her that the children's signatures were required?

A. Prior to going to Court on May the 2nd and having the jury dismissed. As we arrived at the settlement and other phases of it, the fact that the children would have to sign was discussed, and it, the fact that the children would have to sign was discussed, and it was quite a point of discussion, and it was agreed that it would have to be done, that hopefully we would have no problems, she would make the effort, and it just had to be faced, that's all.

Q. Now, subsequent to putting Mrs. Spencer on the plane, you said you discussed getting the signatures of the children on this document. Did you or Mrs. Spencer ever obtain any signatures of the children to these documents?

A. Yes, we received back in the mail from Mrs. Spencer three documents that had been—that is, I guess I can assume they were signed by Miriam, there was a notary, Colorado notary acknowledged the signature of her daughter, Miriam, on the two covenants and on a separate paper I'd prepared to help shore us up in our battle we thought we'd have with the bank on getting the funds released even though we had the children sign.

Q. (By Mr. Crapo) Who sent these three documents to you?

A. Louise Spencer.

Q. And when did this occur?

A. The documents were signed by Miriam on the 18th of May, 1973.

Q. Some eleven days after the original documents were signed?

A. Yes. . . .

Q. (By Mr. Webb) Did you receive any instructions from Mrs. Spencer as to whether or not these documents should be released to anyone else?

A. Oh, they were sent to me to submit to the Court.

Q. Were they submitted to the Court?

A. No, because we didn't obtain the other signatures.

Q. Did you ultimately receive some instructions from Mrs. Spencer not to submit any of the papers and not to implement the purported settlement?

A. I don't think so. I was fired as an attorney, but I don't think I received those instructions.

Sept. Tr. 161

(Mr. Thatcher):

Q. (By Mr. Crapo) Mr. Thatcher, did Mrs. Spencer ever disavow the settlement agreements to you?

A. She discharged me as an attorney, and there were some inferences of disavowing. I really can't recall her disavowing the settlement as such prior to my discharge.

Q. When were you discharged?

A. I believe it was July 28, 1973, or thereabouts.

Sept. Tr. 202

(Mr. Rigby):

A. She came into the office and I was busy in my office with the door open, and she talked to a couple of the secretaries that were there present at the reception desk, and as she talked to them she walked into my door and Gordon subsequently walked out of his door and so we all sort of grouped at the entrance to my office. And she was smiling and gay, and she had to—she said, I just couldn't leave without telling you how much I appreciate what you people have done for us, how pleased I am that it's settled as to the livestock auction company and she told the girls, she said, you ought to be proud of your employers, they did a beautiful job and I'm so happy it's settled with them and we're going to get that bank, and I have talked with several of my friends on the telephone and I got in my car and went to visit them, and she said, this is a good day after twelve years.